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SUPREME COURT, U.S.

No. 83-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE INTEREST OF BABY GIRL K,
A PERSON UNDER THE AGE OF 18;

BRYON BUHSE, Appellant,

v.

LISA KRUEGER, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Bryon Buhse, the appellant, appeals from the final judgment of the Supreme Court of the State of Wisconsin, dated July 1, 1983, affirming the termination of his parental rights to the child concerned and holding that Wisconsin Statutes section 48.415(6)(a)2, as applied in this case, is constitutional since it does not violate appellant's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and holding that appellant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution were not violated.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Wisconsin, entered July 1, 1983, which appears in Appendix A, is reported at 113 Wis. 2d 429, ___ N.W.2d ___ (1983).

The Supreme Court of the State of Wisconsin in its July 1, 1983, opinion affirmed the opinion of the Wisconsin Court of Appeals District III dated August 17, 1982. The Court of Appeals' opinion was not published, and a copy appears in Appendix B.

The findings of fact and judgment of termination of parental rights of the Marathon County Circuit Court of the State of Wisconsin are not reported, and copies are attached in Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of Wisconsin affirming the termination of appellant's parental rights in the child concerned was entered on July 1, 1983.

A notice of appeal to this Court was duly filed in the Supreme Court of the State of Wisconsin on July 30, 1983. See Appendix D.

This appeal is being filed for docketing in this Court within 90 days from the entry of judgment in the Wisconsin Supreme Court. Rule 28.2. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257(2).

QUESTIONS PRESENTED

1. Does Wisconsin Statutes section 48.415(6)(a)2 violate the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution since it unjustly discriminates against unwed fathers?

2. Does Wisconsin Statutes section 48.415(6)(a)2, as applied, violate the rights of unwed fathers under the Due Process Clause to the Fourteenth Amendment to the United States Constitution since it was held that a father's rights can be terminated for action or nonaction during the first five months of the mother's pregnancy?

3. Were appellant's rights under the Due Process Clause to the Fourteenth Amendment to the United States Constitution violated by the judgment of termination of his parental rights since no finding of parental unfitness was made?

CONSTITUTIONAL PROVISIONS AND STATUTE

Fourteenth Amendment, United States Constitution:

Section 1...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Statutes Section 48.415(6)(a)2:

...Grounds for termination of parental rights shall be one of the following: ...(6) Failure to assume parental responsibility. (a) Failure to assume parental responsiblity may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or

adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and: ... (2) That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.

• • • •

RAISING THE FEDERAL QUESTION

The constitutional questions were not raised before the trial court.

The constitutional issues presented in this matter were raised and decided for the first time before the Wisconsin Court of Appeals. Likewise, the Wisconsin Supreme Court reached all of the constitutional issues raised in this matter. The Wisconsin Supreme Court considered and expressly rejected the appellant's federal constitutional claims.

• • • •

PARTIES TO THE PROCEEDINGS BELOW

The following are the parties who participated in the proceedings before the Wisconsin Supreme Court:

Bryon Buhse, father of the child concerned, represented by Atty. Gerhardt F. Getzin, Getzin & Janetta, 408 Third Street, Suite 307, P. O. Box 3005, Wausau, WI 54401-8205.

Lisa Krueger, mother of the child concerned, represented by Atty. Patrick M. Brady, Bradley, Brady & Hoover, 107 Sixth Street, P. O. Box 898, Wausau, WI 54401.

Baby Girl K, child concerned, represented by her Guardian ad Litem, James Kurth, Attorney at Law, 128 Grand Avenue, P. O. Box 1547, Wausau, WI 54401.

28 U.S.C. s. 2403(b) may be applicable in this matter. Service of this Jurisdictional Statement has therefore been made on Bronson LaFollette, Wisconsin Attorney General, State Capitol, Madison, WI 53702.

STATEMENT OF THE CASE

On March 17 1981, Baby Girl K was born to L.K., appellee in this matter, in Wausau, Wisconsin. The parents of the child were not r ried. B.B., appellant in this matter, the father of the child, was incarcerated in November of 1980, about five months into the pregnancy of Baby Girl K.

At the time B.B. was initially imprisoned, he and the mother had plans to marry. L.K. changed her mind about marriage after B.B. was incarcerated and before the child was born. The child was placed in a foster home immediately after birth. The Marathon County Department of Social Services filed a petition for termination of parental rights of both parents in the Marathon County Circuit Court on March 25, 1981. On April 13, 1981, B.B. filed a declaration of parental interest with the Wisconsin Department of Health and Social Services. See Appendix E.

B.B. did not consent to the termination of his rights, and the first petition was subsequently dismissed. A petition for determination of paternity and custody was filed on August 3, 1981, in the Marathon County Circuit Court by B.B. A petition for determination of the status of the child alleged to be in need of protection and services (hereinafter referred to as "CHIPS proceedings") was then filed August 4, 1981, by the Marathon County Department of Social Services. B.B. appeared in the CHIPS proceedings and let it be known that he was recommending to the court that the child be placed with B.B.'s mother's family. On August 13, 1981, L.K. filed a petition for termination of parental rights of B.B. under Wisconsin Statutes section 48.415(6)2. The legal actions included: the action for determination of paternity, an action for custody by B.B. in his petition for determination of paternity, the CHIPS proceeding, and the action for

termination of B.B.'s parental rights. These actions were consolidated into one case in the Marathon County Circuit Court.

On December 23, 1981, the trial court granted B.B.'s motion for summary judgment and adjudged him the father of the child. Immediately thereafter, a hearing was held on the petition for termination of parental rights. In support of her petition to terminate these rights L.K. contended and the trial court found that B.B. did not contribute to the expenses of the preganancy before he was incarcerated and that on one occasion L.K. was physically assaulted by B.B. while pregnant.

The mother also testified that: B.B. did have a concern for mother and child both during and after the pregnancy; B.B. was happy when he learned of the pregnancy and spent every day with the mother until his incarceration; B.B. and L.K. had plans to marry until L.K. changed her mind about the marriage and decided the child should be put up for adoption after B.B. was incarcerated; B.B. did pay the dental expenses of the mother during the pregnancy; after he was incarcerated, L.K. wrote to B.B. telling him not to worry about the expenses of her pregnancy; and it was made known to L.K. that B.B. was willing to provide for both the mother and the child by placement in B.B.'s mother's home until he was released. After the child's birth, B.B. wrote to the foster parents, the trial judge and the Marathon County Department of Health and Social Services requesting photographs and information on the child's placement and welfare and expressing his intent to have the child placed with his mother's family until he was released and could care for the child himself. On one occasion while the action was pending, the trial judge explicitly rejected B.B.'s attempts to communicate with his daughter, stating that such action was premature until paternity was established.

On December 23, 1981, the Marathon County Circuit Court, the Honorable Leo D. Crooks presiding, found that B.B. had failed to assume parental responsibility within the meaning of Wisconsin Statutes

section 48.415(6)2. In its findings of fact, the court found, among other things, that B.B. neglected to provide care or support to L.K. during her pregnancy, even though he had the opportunity and the ability to do so, that he failed to present evidence of any attempts on his part to establish a parental relationship, and that he failed to make any attempt to contribute towards the medical expenses occasioned by the pregnancy and delivery. Trial court issued judgment terminating B.B parental rights to Baby Girl K. See Appendix C.

In his opinion issued from the bench at the conclusion of the December 23, 1981, hearing, Judge Crooks found that, "Admittedly, [B.B.] did not have the opportunity to exercise 'significant responsibility' but he did accept that he was the father, that [B.B.] expressed an interest for both the child and the mother and that he intended to marry her."

No findings were made by the trial court regarding parental unfitness of B.B.

B.B. appealed the judgment of termination of his parental rights to the Wisconsin Court of Appeals which affirmed the trial court on August 17, 1982. B.B. then petitioned for review to the Wisconsin Supreme Court which issued its decision on July 1, 1983.

Although appellant did not raise any constitutional objections to the petition for termination in the trial court, he did raise constitutional objections, contained in the questions presented to this Court, on appeal. The Wisconsin Supreme Court decided these issues. In Wisconsin, consideration of a constitutional issue raised for the first time on appeal is discretionary with the appellate courts. The courts will consider the issues if it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue, and if there are no factual issues that need resolution. The Wisconsin Supreme Court exercised its discretion to consider the issues and did so. See Appendix A, page 19.

THE QUESTIONS ARE SUBSTANTIAL

I. WIS. STAT. S. 48.415(6)(a)2 VIOLATES THE EQUAL PROTECTION CLAUSE TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

This Court has recognized that gender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause. Caban v. Mohammed, 441 U.S. 4, 393 (1979). In Justice Abrahamson's dissent issued in the Wisconsin Supreme Court opinion below, Chief Justice Beilfuss and Justice Heffernan joining, it was stated, "Everyone agrees that Wis. Stat. s. 48.415(6)(a)2 treates unmarried parents differently according to their gender." Justice Abrahamson goes on in her dissent to give a detailed history of this Court's decisions regarding Equal Protection issues in cases involving unwed fathers. Justice Abraham concludes, as was argued by appellant in his brief in the Wisconsin Supreme Court, that biological differences alone are not sufficient justifications for this gender-based statute.

Since another subsection of the statute in question, Wis. Stat. s. 48.415(6)(a)1, provides for circumstances in which there are difficulties in ajudication of paternity, the only reasons left for support of gender-based distinctions in the statute in question are overly broad gender-based justifications. No other justification has ever been raised as to why this statute should not be applied to unwed mothers as well as unwed fathers. Again, Justice Abrahamson in her dissenting opinion eloquently speaks to the point of improper gender distinction at the base of this statute:

> Biology dictates only that a woman carry a child. It does not dictate that she show responsibility by providing proper care for herself (and thus the unborn child) or even that she love the child. The mother has control over prenatal care which, as the majority recognizes, is 'important to the eventual health and well-being of an infant.' ... A woman can disregard the care and protection of the child during pregnancy by ignoring the importance of proper nutrition, medical care, and exercise, by smoking or ingesting dangerous drugs, by overuse of caffeine and alcohol, by gaining too much or too little weight, by exposing herself to hazardous environmental elements, or by subjecting herself to stress. A

woman's support and care of an unborn child are voluntary and important. ...

> The majority has generalized that the mother is naturally closer to her child and has the natural obligation to raise the child. In this case, though, the mother's relation to the child during pregnancy was not explored, but we do know that the mother voluntarily decided not to raise the child, placing the child outside her home within three days after its birth, for reasons that may very well stem from her love for the child and her desire to allow it to be adopted. The trial court found as a fact that the "child had no relationship with either parent..." (emphasis added in opinion). Accepting this finding of the circuit court, I must conclude that the mother and father in this case are similarly situated as to the child. Nonetheless, the statute treats the two parents differently, for no apparent reason. If this mother refused to terminate her parental rights voluntarily, involuntary termination proceedings could not be instituted against her on the ground that she failed to establish a substantial parental relationship with the child because the statute does not apply to the unwed mother. When one takes into consideration the father's actual efforts to establish the relationship with the child by initiating paternity proceedings one month after the child's birth and expressing constant interest in the child, it is ironic that he, not the mother, can have his parental rights involuntarily terminated on this ground and without a finding of unfitness."

In Interest of Baby Girl K, 113 Wis.2d 429, 470-71, 473 , ___ N.W. 2d ___ (1983).

It is clear that Lehr v. Robertson, ___ U.S. ___ (1983), does not overrule the holding of Caban v. Mohammed, 441 U.S. 380 (1979) as quoted above. It is extremely important to note that the Wisconsin Statute is significantly different from the statutes in question in Caban and Lehr. More than sufficient protection to enable adoption of children forsaken by their parents is provided in the other grounds for termination of parental rights in Wis. Stat. s. 48.415: abandonment, continuing need of protection or services, continuing parental disability, continuing denial of visitation rights and repeated abuse. If unwed mothers or unwed fathers do not provide substantial parental relationships for children, sufficient protection is provided for adoption of the child throught the grounds of abandonment, continuing need of protection or services or repeated abuse. If it is necessary, in the mind of the Wisconsin legislature, to provide for termination in absence of a substantial parental relationship as defined by the statute, there is

no sufficient reason to discriminate in such a broad gender-based manner against unwed fathers.

II. A FATHER'S FUNDAMENTAL RIGHTS TO PARENTING ARE VIOLATED UNDER THE DUE PROCESS CLAUSE IF HIS PARENTAL RIGHTS CAN BE TERMINATED FOR NOT ESTABLISHING A PARENTAL RELATIONSHIP DURING THE FIRST FIVE MONTHS OF PREGNANCY

The Wisconsin Supreme Court held that Wis. Stat. 48.415 allows for termination of an unwed father's parental rights for failure to establish a substant parental relationship during the first five months of the mother's pregnancy. The appellant argued before the Wisconsin Supreme Court that conduct during gestation may be a factor in determining the nature of the parental relationship; however, to hold that a person's parental rights can be terminated for not establishing a substantial parental relationship before the birth of the child, for five months in this case, would be a construction of the statute that would render it unconstitutional.

It is clear that parental rights are a fundamental interest to be protected under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535 (1942) and [r]ights far more precious...than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring].

Stanley v. Illinois, 405 U.S. 645, 652 (1972).

In Alsager v. District Court of Polk County, 406 F. Supp. 10, 15, 16 (S.D. Iowa C.D. 1975), a case dealing with an Iowa parental termination statute, the nature of the fundamental constitutional right was discussed:

A plethora of opinions by the United States Supreme Court, addressed to the nature of constitutional interests implicated where various aspects of family life are threatened, indicate that the Alsagers have a fundamental right to family integrity.

In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Supreme Court upheld the right of parents to have their children taught the German language. The Court determined that the "liberty" guaranteed by the Fourteenth Amendment "without doubt, . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." Id. at 399, 43 S.Ct. at 626. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-535, 45 S.Ct. at 573. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court noted that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. . . . And it is the recognition of this that these decisions (Meyer and Pierce) have respected the private realm of family life which the state cannot enter." Id. at 166, 64 S.Ct. at 442.

This "liberty" right was similarly recognized in Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), where the Court emphasized the fundamental nature of the constitutionally protected right to marry and to procreate while invalidating a statute allowing the sterilization of habitual criminals. In May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), the Court denied full faith and credit to an ex parte custody decree, noting that the Fourteenth Amendment's liberty included a parent's "immediate right to the care, custody, management and companionship of . . . minor children." Id. at 533, 73 S.Ct. at 843. More recently, in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), the Court invalidated mandatory leave provisions for pregnant school teachers because they unnecessarily interfered with the decision to raise a family. The Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id., 94 S.Ct. at 796, 39 L.Ed.2d at 60.

Other decisions, while premised on a "privacy" rather than a "liberty" rationalae, have shown a similar solicitude for the family enclave. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). In Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Court acknowledged the right to family integrity in declaring Illinois' dependency statute unconstitutional for depriving unmarried fathers of the care and custody of their natural children on the death of their mother. In the words of the Court, "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." (citations omitted) Id. at 651, 92 S.Ct. at 1213.

> Finally, in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court addressed the pertinence of many of its above-mentioned decisions to the abortion context. The Court noted that while privacy is not explicitly mentioned in the Constitution, a right to a "guarantee of certain areas or zones" of privacy includes only those rights that are "implicit in the concept of ordered liberty," such as "activities relating to marriage . . . procreation . . . contraception . . . family relationships. . . and child rearing and education. Id, at 152, 93 S.Ct. at 726 (citations omitted). The Court further stated its belief that the privacy right is "founded in the Fourteenth Amendment's concept of personal liberty." Id, at 153, 93 S.Ct. 727.
>
> The inescapable conclusion arising from the foregoing authorities is that the Alsagers possess a fundamental "liberty" and "privacy" interest in maintaining the integrity of their family unit. See generally, Note, Parental consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 Harv.L.Rev. 1001, 1014-15 (1975). It is this fundamental right to family integrity, protected by the Due Process Clause of the Fourteenth Amendment, which is menaced by Iowa's parental termination statute.

Recently the United States Supreme Court reaffirmed the importance of and protection given to parental rights in Santosky v. Kramer, ___ U.S.___, 102 S.Ct. 1388, 1394 (1982):

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

This Court should note that the trial court which terminated the parental rights of the appellant found from the bench immediately after the hearing that, "Admittedly, Mr. B. did not have the opportunity to exercise 'significant responsibility' but he did accept that he was the father," that Mr. B. expressed an interest for both the child and the mother, and that he intended to marry her. Record 70, p. 51. Despite this finding, the trial court and the Wisconsin Supreme Court have seen fit to establish a rule of law in this case that a father's action prior to the birth of his child may form a sufficient basis to conclude that he had an "opportunity" to establish a substantial

parental relationship with the child. In the Interest of Baby Girl K, 113 Wis. 2d 429, 438, _____ N.W.2d _____ (1983). Such a holding is contrary to the constitutional protection afforded to parental rights.

This Court should take plenary consideration of this issue since the holding of Lehr needs to be clarified as applied to the circumstances of Wis. Stat. s. 48.415(6)(a)2.

It is true as the majority opinion in Baby Girl K, 113 Wis. 2d 249 at 445 states that this Court in Lehr noted that there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility." Does the holding in Lehr mean that an unwed father does not have any more than five months during the pregnancy of the mother to establish a substantial parental relationship? The Wisconsin Supreme Court so held. That holding simply cannot pass this Court's inspection without full consideration of this extremely important issue through the submission of briefs and oral argument.

III. A FINDING OF PARENTAL UNFITNESS IS NECESSARY IN ORDER TO PROTECT THE UNWED FATHER'S RIGHTS UNDER THE DUE PROCESS CLAUSE

The unwed father's parental rights in this matter were terminated for failing to establish a substantial parental relationship without any finding of parental unfitness made by the trial court. Not only did the Wisconsin Supreme Court find that a father's action prior to the birth of his child may form a sufficient basis to conclude that he had opportunity to establish a substantial parental relationship but it also concluded that no finding of parental unfitness was necessary. In the Interest of Baby Girl K, 113 Wis. 2d 429, 438-39, _____ N.W.2d _____ (1983).

Again, this Court has the benefit of an eloquent dissenting opinion on this issue. Chief Justice Bruce Beilfuss, with Justices Heffernan and Abrahamson joining in dissent, provide a detailed history of cases regarding the fundamental interests of parents in their children which

is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. Baby Girl K, at 451-463.

Chief Justice Beilfuss notes that the majority opinion held that the due process clause does not require a finding of unfitness before termination and that the majority placed its reliance on Lehr v. Robertson, _____ U.S. _____ (1983). As noted by the Chief Justice, the New York statutory scheme under review in Lehr has absolutely no similarity to W Stat. s. 48.415(6)(a)2, "and thus Lehr at best has only very limited applicability to the instant case." Id at 458.

In both Lehr and Quilloin v. Walcott, 434 U.S. 246 (1978), it was apparent that the fathers whose rights were terminated did not have any significant relationship with the child. In Lehr the father did not attempt to establish a legal tie with the child until after the child was two years old. Lehr, _____ U.S. _____, Slip op. p. 14. In Quilloin the father was attempting to block adoption after eleven years of failing to attempt to establish any legal tie with the child. Quilloin, at 249.

Although it is clear that proper protection must be given to illegitimate children in order to insure they are adopted when appropriate, this Court must carefully scrutinize instances where states terminate a parent's fundamental interest in his child without requiring a finding of parental unfitness. It is clear that the due process clause provides substantial protection to a parent's interest. Where a parent has come forth and asserted his parental interest by filing a declaration of parental interest before the child is even born, where he has filed an action to establish his own paternity, and where he has filed a motion for custody of the child, the due process clause should not allow for a summary disposition terminating his parental rights based on a period of five months during the mother's pregnancy.

CONCLUSION

The appellant in this matter urges this Court to carefully read the majority opinion and the two strong dissenting opinions issued by a

closely divided Wisconsin Supreme Court. A decision which interprets a state statute not to be in violation of the equal protection and due process clauses when a parent's rights have been terminated because of his gender and because of actions or nonactions during the first five months of pregnancy presents very substantial questions which this Court should closely inspect upon briefing and oral argument.

Respectfully submitted,

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September 28, 1983

APPENDIX A

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 82-087

STATE OF WISCONSIN : IN SUPREME COURT

IN THE INTEREST OF BABY GIRL K.,
a person under the age of 18:

L.K.,

Petitioner-Respondent-Petitioner,

v.

B.B.,

Respondent-Appellant.

FILED

JUL 1 1983

MARILYN L. GRAVES
CLERK OF SUPREME COURT
MADISON, WISCONSIN

REVIEW of a decision of the Court of Appeals. AFFIRMED.

DAY, J. This is a review of an unpublished decision of the Court of Appeals which affirmed a judgment of the Circuit Court for Marathon County, Leo D. Crooks, Judge, terminating the parental rights of the father, B.B., to Baby Girl K. under the provisions of §48.415(6)(a)2 and 6(b),[1/] Stats. (1981-82).

There are four issues presented on review. The first issue is: Does §48.415(6)(a)2 permit termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the state prison system from the fifth month of the mother's pregnancy?

The second issue is: Was the termination of B.B.'s parental rights under the provisions of §48.415(6)(a)2, Stats. properly ordered here?

The third issue is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under §48.415(6)(a)2, Stats?

The final issue is: Does §48.415(6), Stats. violate the Equal Protection Clause of the Fourteenth Amendment?

We conclude that the mere fact that the father of the child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude possible termination of his parental rights under §48.415(6)(a)2, Stats. We also conclude that due process does not require a finding of parental unfitness where the father has failed to establish a substantial parental relationship under §48.415(6)(a)2. We determine that the trial court properly terminated B.B.'s parental rights under §48.415(6)(a)2, Stats.

Finally, we conclude that §48.415(6)(b)2, Stats. does not violate the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, we affirm the decision of the Court of Appeals.

L.K., Baby Girl K.'s mother, and B.P. began dating in July, 1979. At that time and up through to the birth of Baby Girl K. on March 17, 1981, L.K. was a minor.

In June, 1980, L.K. became pregnant with Baby Girl K. Approximately five months later, in November, 1980, B.B. was convicted of burglary and incarcerated at the Kettle Morraine Correctional Institute. A prior conviction occurred in 1977 when he was convicted of burglary and sent to the Wisconsin State Reformatory.

From June until November, 1980, B.B. continued seeing L.K. According to the testimony of L.K., B.B. did not work but apparently supported himself quite well by dealing in drugs and "robbing places."[2/] During that period of her pregnancy, L.K. stated that B.B. treated her "fairly good" but she recalled an incident where "he picked up my bike and threw it into the road from the porch, and then. . .grabbed me around the neck and tried to strangle me." L.K. also testified that B.B. would use the money from his drug dealing and robberies to "go out to bars and. . .buy drinks for everyone" and to buy marijuana. She noted that "he smoked a fair amount of his money away."

Prior to his incarceration, B.B. did not contribute to defraying the cost of any of L.K.'s pregnancy related expenses although he did pay some of her dental expenses.[3/] After his incarceration, B.B. also made no contribution to her expenses.

However, L.K. testified that she told him not to worry about the expenses while he was in prison. She also testified that B.B. suggested that she and the child go live with his mother after the baby was born.

While in prison, prior to the birth of Baby Girl K., B.B. and L.K. corresponded. In his letters, B.B. twice requested that L.K. come visit him and try to smuggle some marijuana to him. B.B.'s letters also expressed the concern if L.K. gave up the baby for adoption, that might end their relationship.[4/]

Before Baby Girl K.'s birth, B.B. apparently initially consented to having his parental rights terminated. However, as L.K. testified on cross-examination, he changed his mind "right around the time I stopped writing him." It was L.K.'s belief that B.B. wanted the child in order to perpetuate a relationship with her. The record and B.B.'s correspondence with L.K. lend credence to her statement.

B.B. points out that he offered to have L.K. and the child live with his mother and step-father. L.K. refused that offer. A social worker's report which was ordered by the trial court following B.B.'s request for an evaluation of his parents' home showed that B.B. had been removed from that household and placed in a foster home and that later a half-sister had likewise been taken out of the household and placed in a foster home.[5/]

On March 17, 1981, Baby Girl K. was born. L.K. signed a Voluntary Placement Agreement with the Marathon County Department

of Social Services (Department) on March 18, 1981. The purpose of the agreement was to allow Baby Girl K. to be placed in a foster home upon her discharge from the hospital. The placement occurred on March 20, 1981. Baby Girl K. has remained in the same foster home since that date. The foster parents have expressed an interest in adopting her should the parents' rights be terminated.

L.K. initially filed a petition for voluntary termination of parental rights but withdrew it after learning that B.B. would not consent to having his parental rights terminated. B.B. had filed a Declaration of Parental Interest with the Department on April 13, 1981. In June, 1981, L.K. filed a petition requesting that Baby Girl K. be found in need of protection or services and that her custody be transferred to the Department for the purpose of continued foster care placement ("Chips" petition).

On August 3, 1981, B.B. filed a petition for a determination of paternity and custody, and a motion to consolidate these matters with the "Chips" proceeding. Subsequently, L.K. filed a petition for the termination of B.B.'s parental rights under §48.415(6), Stats. All of these actions were consolidated.

On December 23, 1981, the trial court adjudged B.B. the father of Baby Girl K. The court then held a hearing on L.K.'s petition to terminate the parental rights of B.B. The testimony set out above was given at this hearing. In addition, at the

hearing, Baby Girl K.'s guardian ad litem recommended that B.B.'s parental rights be terminated.

Following the hearing, in a decision from the bench, the trial judge ordered B.B.'s parental rights terminated. The court determined that B.B. had "failed to assume parental responsibility as set forth and defined in §48.415(6)(a)2 and subsection (6)(b)," Stats. In so deciding, the court stated:

> "This Court does find that preliminary to his incarceration Mr. [B.B.] was able to provide care and support and failed to do so. This record fails to show that Mr. [B.B.], in any way, attempted to carry on a meaningful relationship which this Court could consider as a substantial parental relationship, even by mail, or by phone, or in any other manner, doing those things that are essential to a substantial parental relationship: expressing concern with small gifts, a card, request that the baby be brought down for a visit, any number of little things that spell the difference between the results of a sexual encounter or a parent-child relationship.
>
> "This Court does believe that in spite of his incarceration Mr. [B.B.] had that opportunity to establish a substantial parental relationship. The legislature has not given us guidelines where they will decide or where they have decided, that "X" number of weeks or months or years constitutes the failure to establish that parental relationship and it is true that Mr. [B.B.] did file the Declaration of Parental Interest as set forth in Exhibit 4. There is no doubt in my mind that he is interested. But, he has failed to carry through on those areas that are essential to establish a substantial parental relationship."

The trial court also made the following written findings of fact and conclusions of law which are pertinent:

FINDINGS OF FACT

> "7. That during the period that petitioner was pregnant with Baby Girl [K.], the respondent, [B.B.], on two occasions, wrote letters to

petitioner asking her to smuggle marijuana into the Kettle Morraine Correctional Facility for his personal use.

"8. That on one occasion during the period that petitioner was pregnant with Baby Girl [K.] the respondent, [B.B.], physically assaulted petitioner.

"9. That the respondent, [B.B.], neglected to provide care or support to petitioner during her pregnancy even though respondent, [B.B.], had the opportunity and ability to do so.

"10. That respondent, [B.B.], failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl [K.] such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts.

"11. That respondent, [B.B.], failed to make any attempt to contribute towards the medical expenses of petitioner occasioned by her pregnancy and the subsequent delivery of Baby Girl [K.].

"12. That there is a high degree of likelihood that Baby Girl [K.] will be adopted in the event the parental rights of [B.B.] are terminated.

"13. That Baby Girl [K.] is in good health and at the time of placement of foster care, was only three (3) days old.

"14. That the child has had no relationship with either parent or other family members so that it would not be harmful to said child to sever such relationships.

"15. That in the event the parental rights of [B.B.] are terminated, that the child will be able to enter into a more stable and permanent family relationship.

CONCLUSIONS OF LAW. . .

"16. That respondent, [B.B.], has failed to assume parental responsibility for Baby Girl [K.] within the meaning of Sec. 48.415(6), Wis. Stats.

"17. That it is in the best interest of Baby Girl [K.] that the parental rights of her father, [B.B.], be terminated."

B.B. appealed from the judgment. The Court of Appeals a irmed. That Court concluded that the evidence was sufficient to support a finding that B.B. had an opportunity to develop a substantial relationship with Baby Girl K. and had failed to do so. The Court of Appeals determined that the trial court's finding that the termination of B.B.'s parental rights would be in the best interest of Baby Girl K. was not against the great weight and clear preponderance of the evidence. The court also concluded that a specific finding of parental unfitness was unnecessary to terminate B.B.'s parental rights. However, the court went on to note that even though a finding of unfitness was not required, such a finding "is clearly sustained by the record." Finally, the court held that §48.415(6)(a)2 did not unconstitutionally deny B.B. the equal protection of the law.

The first issue on review is: Does §48.415(6)(a)2, Stats. permit the termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the Wisconsin prison system from the fifth month of the mother's pregnancy?

Section 48.415(6)(a)2, Stats. allows the parental rights of a father whose paternity has been adjudicated to be terminated under certain conditions. The conditions exist where a father has not established a substantial parental relationship prior to

the adjudication of paternity even though he had reason to believe he was the father of the child and had an opportunity to establish such a relationship. The question here is did B.B. have an opportunity to establish a relationship with Baby Girl K.

In evaluating whether a substantial parental relationship exists, the legislature in §48.415(6)(a)2, Stats. authorized trial courts to consider the father's behavior during the pregnancy of the mother. Specifically, §48.415(6)(a)2, Stats. allows a court to consider whether the father "has ever expressed concern for or interest in the support, care or well-being of the child or mother during her pregnancy and whether the person has neglected or refused to provide care of support even though the person had the opportunity to do so." It is clear therefore that the legislature intended that a father's pre-delivery behavior be a consideration in determining whether the father had established a substantial parental relationship.

May a father's action prior to the birth of his child form a sufficient basis to conclude that he had an "opportunity" to establish a substantial parental relationship with the child? We hold that it may.

In §48.415(6)(b) the legislature defined "substantial parental relationship" as "the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child." (Emphasis added). Medical authorities have long recognized that prenatal care is important

to the eventual health and well-being of an infant.[6/] Because what happens to a fetus in utero can have a significant impact upon the quality of life a child will have after birth, we conc de that a parent's action prior to a child's birth can orm a sufficient basis for determining whether that parent has established a substantial parental relationship with the child.

The parental rights of fathers of children born out of wedlock have been given constitutional protection. Stanley v. Illinois, 405 U.S. 645, 658 (1972). If the statute foreclosed the possibility of a father showing he had developed a substantial parental relationship with his child, due process would be violated. Here however, that possibility is not foreclosed. The father's parental rights must be continued absent a showing that he has failed to establish a substantial parental relationship.

The opportunity to exercise responsibility for the care and protection of a child begins before the child's birth. A statute such as this one which allows consideration of the father's conduct before the birth of the child recognizes that fact.

We conclude that the mere fact that the father of a child born out of wedlock has been incarcerated in the prison system since the fifth month of the moether's pregnancy does not preclude possible termination of his parental rights under §48.415(6)(a)2, Stats.

Concluding that §48.415(6) (a)2 allows a trial court to terminate the parental rights of a father in a situation like the one here, we now turn to the second issue before this Court on review: Was the the trial court's decision terminati: B.B.'s parental rights under the provisions of §48.415(6)(a)2, Stats. proper? We conclude it was.

The trial court determined that B.B. had "failed to assume parental responsibility for Baby Girl [K.] within the meaning of §48.415(b)." As the basis for this conclusion, the court in its findings of fact noted that: 1) B.B. had asked L.K. on two occasions to smuggle marijuana into him in prison, 2) had physically assaulted L.K. while she was pregnant, 3) B.B. had neglected to provide care or support to L.K. during the pregnancy even though he had the opportunity and ability to do so, 4) had failed to present any evidence of attempts on his part to contact the child, write to persons caring for her or to send cards or gifts, and 5) B.B. had failed to contribute toward L.K.'s medical expenses arising from the pregnancy and delivery of Baby Girl K.

A trial court's finding of fact will not be set aside unless against the great weight and clear preponderance of the evidence.[7/] A review of the record here convinces us that the findings here were correct. Each finding is supported by clear and convincing evidence in the record.

L.K. established a prima facie case for the termination of B.B.'s parental rights under the statute. Because such a case

had been established, the burden shifted and it became necessary for B.B. to present evidence that he had established a substantial parental relationship with Baby Girl K. This he completely failed to do. Although he attended the trial, he presented no testimony whatsoever on his behalf and, with the exception of his Declaration of Parental Interest, no evidence on the termination question.

Based upon his findings of fact, the trial court concluded that B.B.'s parental rights should be terminated under §48.415(6)(a) 2. He also concluded that the termination would be in the best interest of Baby Girl K.

In order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate. This burden of proof is required both by §48.31, Stats. (1981-82) and by the due process clause, Santosky v. Kramer, 455 U.S. 745, 769, 102 S. Ct. 1388, 1402-1403 (1982).

We conclude that the petitioner here met this burden. The findings of fact as set out by the trial court provide clear and convincing evidence that B.B. had failed to establish a substantial parental relationship with Baby Girl K. and that termination of B.B.'s parental rights was in the child's best interest.

B.B. showed a blatant disregard for both mother and child when he asked L.K. to smuggle marijuana into prison for his use.

If L.K. had acquiesed to his request and been apprehended, she would have faced the possibility of a prison term.[8/] Further, B.B.'s physical assault of L.K. certainly shows no concern for the care or well-being of either mother or child. I. addition, the testimony of the guardian ad litem supported termination.

The law is made to try and cope with the ever increasing number of illegitimate births and to alleviate the increasing burden to society that such households often present; ever growing relief rolls, and the bleak future the children face living at a near poverty level. It is for these reasons among others that when the single mother is willing to allow her child to be adopted whatever right such a child's father may have must be resolved in a manner that looks out for the child's best interest and at the same time protects the rights of the father. It is for this reason that examining his attitude and relationship to the unborn child and its mother makes common sense. Short of abortion, the pregnant mother can't escape responsibility. But the putative father's relationship is voluntary.

After the child is born his relationship to the child is also indicative of whether a substantial relationship has been established with the child. A court cannot ignore the circumstances of why this father was not physically available from the fifth month of pregnancy. He was convicted and sentenced for burglary. This was not a case of being absent because of illness, military service or the demands of a job.

His absence was due to incarceration from the wilful act of burglary. It was his second incarceration for that crime.

B.B.'s parental rights were properly terminated under the provisions of §48.415(6) (a)2, Stats.

The third issue on review is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under §48.415(6)(a) 2, Stats?

Even though sufficient findings have been made so that B.B.'s parental rights may be terminated under the statute, a question remains as to whether such a termination may be accomplished without a finding of unfitness.

In Stanley, the United States Supreme Court held that before the parental rights of an unwed father could be terminated that person was constitutionally entitled to a hearing on his fitness as a parent. 405 U.S. at 658. In Santosky, the Supreme Court noted that, "the fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents," 455 U.S. at 753, and because of this interest held that termination could only take place where there was clear and convincing evidence it was appropriate. Id. at 769.

This Court, in In the Interest of J.L.W., 102 Wis. 2d 118, 306 N.W. 2d 46 (1981), held that "the due process protections of both the State and Federal Constitutions prohibit the termination of natural parent's rights, unless the parent is unfit." In

J.L.W., because no finding was made that the natural mother was an unfit parent and because such a finding could not be sustained by the record, this Court reversed the order and judgment of the trial court terminating the natural mother's rights and eturned the child to the mother.

Both Stanley and J.L.W. involved natural parents who had at some point in their childrens' lives participated in raising them. However commentators have suggested that the failure of a parent to participate at all in raising of the child may eliminate the constitutional requirements for a finding of unfitness.[9/] We agree.

The recent United States Supreme Court case of Lehr v. Robertson, ___U.S. ___ (Case No. 81-1756, decided June 27, 1983) supports this position.[10/] In Lehr, the Court determined that the rights enjoyed by the natural fathers of children born out of wedlock did not acquire constitutional protection under the due process clause until "the unwed father demonstrates a full committment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child.'" Slip op., p. 12, quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979). The Court went on to add that "the mere existence of a biological link does not merit equivalent constitutional protection." Slip op., p. 12.

In Lehr, the United States Supreme Court determined that the father of a child born out of wedlock who had lived with the

mother of the child up to the time of the child's birth and who had seen the child occasionally after the birth,[11/] had no due process right to be notified of the impending adoption of the child. Essential to this holding was a determination that the father, lacking a substantial parental relationship with the child, had no constitutionally protected interest in his relationship with the child which would be offended by his failure to be notified of the adoption proceedings.

The Unites States Supreme Court in Lehr, noting that there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility," quoted with approval a statement by Justice Stewart in Caban:

> "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." 441 U.S., at 397 (Emphasis in original) (Slip op., pp. 10-11).

The United States Supreme Court then further said in the footnote following:

> "In the balance of that paragraph Justice Stewart noted that the relationship between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if 'the actual relationship between father and child' is sufficient.
>
> "'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been

> the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. In some circumstances the actual relationship betwe father and child may suffice to create in th unwed father parental interests comparable to those of the married father. Cf. Stanley v. Illinois, supra. But here we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.'" Lehr fn. 16, Slip op., p. 11-12, quoting Caban, 441 U.S. at 397, (Stewart, J. dissenting). (Emphasis added).

Although in J.L.W., this Court suggested that due process might require a finding of unfitness before any natural parent's parental rights are terminated, the specific holding related only to a parent who had physical custody of the child for the first four months of the child's life and whose every action "from the time she learned of her pregnancy showed a concern for the child she was to bear." J.L.W., 102 Wis. 2d at 137. Unlike Lehr, J.L.W. was a case where the parent had already "demonstrated a full commitment to the responsibilities of parenthood." Lehr, slip op., p. 12. Thus, this Court's holding in J.L.W. does not require that a finding of parental unfitness be made where the father has failed to establish a parental relationship with the child.

In this case, the trial court found by clear and convincing evidence that B.B.'s parental rights should be terminated because

he had the opportunity but failed to establish a substantial parental relationship with Baby Girl K. We agreed with this determination. B.B.'s failure to establish a substantial parental relationship under the statute is the equivalent of a failure to "demonstrate a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of the child.'" Lehr, slip op., p. 12.

A natural father's interest in personal contact with his child is protected under the due process clause because of this society's belief in the protection of the familial relationship. Lehr, slip op., p. 12. The significance of this relationship "'to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship.'" Id, quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972)) (emphasis added).

Here, although in prison, B.B. had the opportunity to establish a substantial parental relationship with Baby Girl K. Instead of offering care and support to the mother and child, he did the opposite and proceeded along a path which jeopardized not only his own future but that of the mother and child. Although B.B. did not have an opportunity for "daily association" with his

child, that opportunity was lost because of his own doing. We cannot ignore this fact nor the fact that B.B. on at least one occasion attempted to strangle the mother of his child.

Where a father shows so little care, support or concern for the well-being of his child that his parental rights may be terminated under §48.415(6)(a)2, that failure to establish a substantial parental relationship with the child means that the father's interest in contact with his child does not warrant protection under the due process clause of the constitution. Due process does not require a finding of parental unfitness before a father's parental rights may be terminated under §48.415(6)(a)2.

The final issue on review is: Does §48.415(6)(a) 2, Stats. violate the equal protection clause?

This issue was raised for the first time on appeal. The Court of Appeals considered this question and concluded that this statute did not deny B.B. the equal protection of the law.

Consideration of a constitutional issue raised for the first time on appeal is discretionary with this Court and will be done if "it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue and if there are no factual issues that need resolution." Laufenberg v. Cosmetology Examining Bd., 87 Wis. 2d 175, 187, 274 N.W. 2d 618 (1979); State v. Yellow Freight System, Inc., 101 Wis. 2d 142, 158, 303 N.W. 2d 834 (1981). In this case, these requirements are met. Further, the Court of Appeals had the opportunity to

examine this issue and render an opinion on the question. We therefore will exercise our discretion to consider the issue.

Where a statute discriminates on i face between males and females, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Mississippi University for Women v. Hogan, ____U.S. ____, Slip op., p. 5 (July 1, 1982). For a statute which discriminates on the basis of gender to be upheld, there must be a showing that it "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Hogan, slip op., pp. 5-6 quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980). This test must be applied "free of fixed notions concerning the roles and abilities of males and females." Hogan, slip op., p. 6. However, where a statute draws a distinction between classes where all the members of one class possess a characteristic not possessed by all the members of the other class, the fact that the distinction is "gender-based" should not give rise to a presumption that the Equal Protection Clause has been violated. Caban v. Mohammed, 441 U.S. 380, 409-410 (1979) (Stevens, J., dissenting).

The majority in Caban held that a New York statute which gave the mother of children born out of wedlock, but not the father of such children, veto power over the adoption of the children violated the Equal Protection Clause of the Fourteenth

Amendment. In Caban, the children involved were four and six years old at the time of the adoption proceeding. The father had lived with the mother and children as "natural family" for several years prior to the proceeding. 441 U.S. at 389. Although rejecting the contention that unwed fathers necessarily have less of a relationship with their children then do unwed mothers, the Court noted that where newborn infants were concerned, the differences between unwed mothers as a class and unwed fathers might form a basis for a valid gender-based distinction regarding adoption proceedings. 441 U.S. at 389.

In his dissent in Caban, Justice Stevens recognized this exception. He noted that from conception, "on through pregnancy and infancy, the differences between the male and female have an important impact on the child's destiny." 441 U.S. at 404. We agree. During pregnancy, the biological make-up of the mother insures that she will provide care and support for the child forming within her. She cannot help but accept and exercise significant responsibility for the protection and care of the child because her own welfare is tied intimately to the child's.

The purpose of §48.415(6)(a)2 is to promote the best interest of a child while insuring that the rights of a father who has established a substantial parental relationship with the child will not be terminated. Both the state and the unwed mother may have substantial interests in terminating the parental

rights of a father who had no substantial relationship with the child. The statute gives fathers incentive to provide care and support for the mother and child during pregnancy and infancy. Further, it allows for a prompt determination of the status of the child so that, if desired, the child might be adopted into a family that wants a child.

The statute as applied in this case is not based upon fixed notions of what the "proper" roles of males and females should be. The United States Supreme Court in Lehr recognized that "the existence or non-existence of a substantial relationship is a relevant criterion in evaluating both the rights of the parents and the best interests of the child." Slip op., p. 18. The statute here is based upon a recognition that for women biology dictates that they provide care and support for a child during pregnancy. For men however, that care and support must be voluntarily given. Men may or may not accept and exercise significant responsibility for the care and protection of the child during pregnancy; women have it thrust upon them. For men, failure to establish a substantial parental relationship after a child is born is the equivalent of a married father abandoning or neglecting his child which can be the basis for a finding of unfitness. And, as the United States Supreme Court in Lehr noted, "if the father had not 'come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclude[] the State from withholding from him the

privilege of vetoing the adoption of that child.'" Slip op., p. 19. Here, while termination of parental rights rather than the availability of a veto over the child's adoption is at issue, the equal protection questio. is substantially the same.

The statute as applied here does not violate the Equal Protection Clause of the Fourteenth Amendment.

We agree with the trial court and the Court of Appeals that the record here amply supports termination of B.B.'s parental rights.[12/]

BY THE COURT: Decision of the Court of Appeals is affirmed.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

1/ Section 48.415(6)(a)2 and 6(b), Stats. (1981-82) reads:

> "Grounds for involuntary termination of parental rights. At the fact-finding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following: . . .
>
> "(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and: . . .
>
> "2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.
>
> "(b) In this subsection, 'substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

2/ L.K.'s testimony as to these acts was admitted at trial not to prove the commission of the acts but for the purpose of showing that B.B. had funds to support L.K. during this period.

3/ L.K. testified on cross-examination that she asked B.B. prior to his incarceration for help in paying her expenses and in fact had her first doctor bill sent to his house. After the bill went unpaid, it was redirected to L.K.'s parents' house for payment.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

4/ B.B.'s January 26, 1981 letter to L.K. (Exhibit 1 in the record) shows this concern: "I feel that if you do give our baby away that you'll be out fucking guys and you'll forget about me. . .I worry alot about guys going after your ass. . . ."

5/ The report of the social worker from the Marathon County Department of Social Services dated November 19, 1981 and filed with the Court November 24, 1981 shows that B.B. was born June 14, 1958. He was one of three children born to his mother in her first marriage. His parents were divorced in January of 1961. The mother married J.H. later that year and two children were born to them. The social worker's report shows that the department provided social services periodically from the time of the breakup of the first marriage. In 1975 B.B. was placed "in substitute care" because of B.B.'s "disruptive behavior." When B.B. became eighteen the case was closed. A daughter from the second marriage was placed in "substitute care" in 1976. That case was apparently closed when the girl became eighteen in 1980.

6/ 4B G. Gray, Attorneys' Textbook of Medicine, §§305.10, 305.11 (3 ed. 1963); 5B Lawyers' Medical Cyclopedia, §37.5a (C. Frankel ed. 1972).

7/ Onalaska Electrical Heating, Inc. v. Schaller, 94 Wis. 2d 493, 501, 288 N.W. 2d 829 (1980); Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 250, 274 N.W. 2d 647 (1979); Bank of Sun Prairie v. Opstein, 86 Wis. 2d 669, 676, 273 N.W. 2d 279 (1979); Gehr v. Sheboygan, 81 Wis. 2d 117, 122, 260 N.W. 2d 30 (1977); Gerner v. Vasby, 75 Wis. 2d 660, 662-664, 250 N.W. 2d 319 (1977).

8/ Section 161.465(1), Stats. (1981-82).

9/ S. Hayes and M. Morse, Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon, 66 Mq. L. Rev. 439, 452, 475 (1983); See Lehr v. Robertson, ___U.S.___, (Case No. 81-1756, decided June 27, 1983), Slip op. p.13, footnote 17.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

10/ Justice Stevens stated that the questions the United States Supreme Cour had jurisdiction to consider on review were "whether the New York Statutes are unconstitutional because they inadequately protect the natural relationship between parent and child or because they draw an impermissible distinction between the rights of the mother and the rights of the father." Lehr, Slip op., p. 7, fn. 10.

On the latter issue, the father contended "that the gender-based classification in the statute, which denied him the right to consent to [his daughter's] adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause." Id.

11/ According to Justice White in his dissent in Lehr, the fact that the father only occasionally saw the child after her birth was the direct result of the mother's attempts to conceal her whereabouts from the father. As Justice White states the facts:

"According to Lehr, [the father], he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately 2 years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine [the mother] acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father. (footnote omitted). Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August, 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August, 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August, 1978, Lorraine was already married to Mr. Robertson. Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest

FOOTNOTE 11/ CONTINUED ON PAGE 4.

No. 82-087 (IN THE INTEREST OF BABY GIRL K.) FOOTNOTES:

FOOTNOTE 11/ CONTINUED:

unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December, 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here." Lehr, (White, J., dissenting) slip op., p. 2-3.

12/ The statement by Justice Abrahamson in footnote 1 of her dissent alleging that "the majority treats termination of parental rights like a punishment for a crime, thus increasing the legislatively prescribed penalties for commission of a crime by adding a new penalty, loss of a child" is an unwarranted conclusion and is simply incorrect.

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gifts." The entire record before this court simply does not support this finding. The majority perpetuates the trial court's error by also ignoring this very relevant and important evidence.

On the basis of the entire record before this court and the trial court, I believe that the trial court's finding that the statutory grounds for involuntary termination were met to be unsupported by the record. However, because of the nature of the evidence in the record, I would remand the action for a new hearing on this issue rather than simply finding that the statutory grounds were not met. Some of the evidence of B.B.'s attempts to contact the child consists of references to letters which are not in the record and their actual content is unknown. Further, some of the evidence that is actually contained in the record may not have been properly before the trial court. Finally, I believe that the trial court is in a better position to assess the credibility of such evidence and witnesses. This is especially important in this case because L.K. and the guardian ad litem state that B.B.'s concern for the child is motivated solely by his desire to effect a reconciliation with the mother. B.B. denies any such motivation and there is some evidence in the record showing that his interest is genuine, see n. 2, supra. This court is simply not in a position to make an informed decision on this issue which involves a credibility determination. For these reasons I believe this issue should be retried under authority granted to this court by sec. 751.06, Stats.

The majority also holds that due process does not require a finding that B.B. is an unfit parent before his parental rights can be terminated. I disagree. The majority relies on the recent United States Supreme Court decision in Lehr v. Robertson, _____U.S.____ (June 27, 1983), to support this position. I believe their reliance on the Lehr decision is misplaced.

First, the court in Lehr was addressing the limited issue of whether the New York statutory scheme adequately protected

the putative father's opportunity to form a parental relationship with his child, such that he would then be entitled to notice of adoption proceedings. Lehr, _____U.S._____, Slip. op., p. 14. The New York statutory scheme under review in Lehr has absolutely no similarity to sec. 48.415 (6) (a) 2, Stats., and thus Lehr at best has only very limited applicability to the instant case.

Second, I read Lehr to fall into the holding of Quilloin v. Walcott, 434 U.S. 246 (1978), as interpreted by this court in In Interest of J.L.W., 102 Wis. 2d 118, 306 N.W. 2d 46 (1981). In J.L.W. the court held that "except under unusual circumstances like those presented in Quilloin, the due process protections of the State and Federal Constitutions prohibit the termination of a natural parent's rights, unless a parent is unfit." 102 Wis. 2d at 136. The unusual circumstances in Quilloin which allowed the court to terminate parental rights without a finding of unfitness are as follows: an unwed father attempted to block the adoption of his son by the natural mother and her husband when the child was eleven years old and had been in the mother's custody his entire life. The father never had custody and was not seeking custody but wanted to block the adoption which would terminate his parental rights. The court rejected the father's argument that he was denied due process, stating:

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (STEWART, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.' " 434 U.S. at 255.

Similarly, in Lehr, the putative father "never had any significant custodial, personal or financial relationship (with his child), and he did not seek to establish a legal tie until after she was two years old." Lehr, _____U.S._____, Slip op., p. 14. Also, as in Quilloin, the father was attempting to block the adoption by the natural mother who had had custody since birth.

The facts in this case are clearly distinguishable from those in Quilloin and Lehr. This is not a situation as in Quilloin and Lehr where the natural parent displayed almost no interest in the child for its entire life although well aware of the fact of parenthood and able to provide and care for the child. Here B.B. has indicated interest and concern for the child since he learned of her conception and has since shortly after birth requested custody. Further, B.B. is not attempting to block the adoption of Baby Girl K by the natural mother or into an established family unit as in Quilloin and Lehr. In this case the natural mother, three days after the birth, released custody of Baby Girl K to the Marathon County Department of Social Services. Here there are no adoptive parents nor adoption proceedings pending. Nor could there be until B.B.'s parental rights are terminated. Thus we find that the narrow "unusual circumstances" exception recognized in J.L.W. does not apply and due process requires that B.B. be found unfit before his rights can be terminated. As discussed above, the record simply does not support the finding of the majority that B.B. failed to establish a substantial parental relationship. He is therefore entitled to a finding of unfitness before his parental rights can be terminated. Stanley v. Illinois, 405 U.S. 645 (1972).

Further , contrary to the holding of the court of appeals, this court can not find that B.B. is an unfit parent as a matter of law based on the record before this court. Initially, there is an insurmountable constitutional obstacle to the court making such a finding based on this record -- the Due Process Clauses of the State and Federal Constitutions. It is beyond dispute that due process demands adequate notice and an opportunity to be heard when

a person is threatened with termination of a fundamental liberty interest. B.B. was never accorded this constitutionally mandated hearing and thus his parental rights can not be terminated by this court. The record clearly demonstrates that B.B. was never notified that the petitioner was attempting to prove he was an unfit parent. Further, the record shows that the issue was never litigated in the termination hearing, nor even considered by either the trial court or the petitioner. The issue before the trial court at this hearing, and all the evidence presented, was directed solely to the question of whether the statutory grounds for involuntary termination were met. Thus, on this basis alone, the majority's termination of B.B.'s parental rights unquestionably violates due process and should not be sustained.

Further, even without this constitutional impediment, the record is insufficient to support the court of appeals holding that as a matter of law B.B. is an unfit parent. The evidence required to support a finding of parental unfitness must be very substantial:

> "The standards for a finding of unfitness in Wisconsin have long deferred, as much as possible, to parental rights. When unfitness is found, however, it must be based upon most substantial grounds. The standards for unfitness have long been stringent. To support a finding of unfitness,
>
> " 'it must appear that the [parent] has "so conducted himself, or shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with." [Emphasis added.]'
>
> Lemmin v. Lorfield, 107 Wis. 264, 266, 83 N.W.359, 360 (1900). It is evident, then, that a finding of unfitness is a determination that further contact between parent and child will be seriously detrimental to the child." Termination of Parental Right to A.M.K., 105 Wis. 2d 91, 102, 312 N.W. 2d 840 (Ct. App. 1981).

The record simply does not support a finding that as a matter of law it is essential for Baby Girl K's safety or welfare that B.B.'s parental rights be terminated.

The court of appeals, in holding that a finding of unfitness was "clearly sustained by the record," stated:

> "The trial court found that prior to his incarceration, B.B. had funds available to provide care and support for L.K. but failed to do so. The court also considered the incident of physical violence by B.B. toward the mother during her pregnancy and the fact that he requested that she smuggle marijuana into the prison for him twice during her pregnancy. At the very least, B.B.'s conduct demonstrates a complete indifference to the welfare of the child. The court also found that although B.B. was interested in the child, he failed to carry through with actions that would establish a substantial parental relationship."

The court of appeal's reference to the failure of B.B. to support L.K. and establish a substantial parental relationship can not be considered by this court in determining unfitness because the trial court's finding that the statutory grounds were met was not supported by the record. Further, I conclude that evidence of one isolated physical assault on the mother and two requests for marijuana while in prison do not as a matter of law make B.B. an unfit parent by clear and convincing evidence.

The only other evidence in the record that goes to unfitness is the fact that B.B. is now incarcerated for a burglary conviction, has a criminal record, and according to L.K.'s testimony, B.B. "dealt in drugs" and "robbed places." While all this evidence clearly is relevant to the issue of fitness, there are no facts in the record detailing any of this evidence. All the record contains is the bare facts stated above. Without an examination into the details of B.B.'s actions, a finding of unfitness is not supportable.

This court can not, based on this inadequate record, make the far-reaching finding of unfitness which leads to the irrevocable termination of parental rights As stated by this court in Termination of Parental Rights to T.R.M., 100 Wis. 2d at 689: "An examination of a record seldom is adequate to make the necessary factual determinations that are a part of this type of controversy." I would also remand the action to the trial

court to conduct a hearing on B.B.'s fitness as a parent.

I therefore dissent.

I am authorized to state that Justices Heffernan and Abrahamson join in this dissent.

No. 82-087

STATE OF WISCONSIN : IN SUPREME COURT

IN THE INTEREST OF BABY GIRL K,
a person under the age of 18:

L.K.,

Petitioner-Respondent-Petitioner,

v.

B.B.,

Respondent-Appellant.

FILED

JUL 1 1983

MARILYN L. GRAVES
CLERK OF SUPREME COURT
MADISON, WISCONSIN

SHIRLEY S. ABRAHAMSON, J. (dissenting). I join Chief Justice Beilfuss's dissenting opinion.[1] I write separately to add that I disagree with the majority's conclusion that sec. 48.415(6)(a)2, Stats. 1981-82, does not violate the equal protection clauses of the Wisconsin and the United States constitutions.

Everyone agrees that sec. 48.415(6)(a)2 treats unmarried parents differently according to their gender. Sec. 48.416(6)(a)2 establishes grounds for terminating the unwed father's parental rights, not the mother's. I conclude that the statute on its face and as applied to the facts in this case unconstitutionally discriminates against men based on their gender.[2]

Both this court and the United States Supreme Court are struggling with the difficult issue of defining the constitutional rights of parents and children. Judges and lawyers, like the general public, are parents and are not insulated from the highly personal and sometimes emotionally charged nature of the issues presented in these cases.[3] In this case we are specifically concerned about the due process and equal protection rights of unwed parents. The Supreme Court first indicated its recognition that unwed fathers have constitutional rights just eleven years ago in Stanley v.

Illinois, 405 U.S. 645 (1972). Stanley raised more questions than it answered, leaving at least four major legal issues unresolved: whether the constitutional rights of unwed fathers are based on concepts of procedural or substantive due process or both; whether all unwed fathers have constitutional rights or whether only unwed fathers who have expressed an undefined amount of interest in the child are to be accorded constitutional protection; whether the constitutional rights of unwed fathers are different depending on the type of proceedings, for example, adoption and termination of parental rights as opposed to custody; and whether equal protection concerns are addressed to distinctions between married and unmarried parents or between male and female parents.

Since Stanley, the Supreme Court has had few occasions to examine the extent to which a natural father's biological relationship with his illegitimate child is accorded constitutional protection. See Quilloin v. Walcott, 434 U.S. 246 (1978), Caban v. Mohammed, 441 U.S. 380 (1979), and, decided just four days ago, Lehr v. Robertson, ___ U.S. ___ (June 27, 1983).[4] Both Quilloin and Lehr appear to address the due-process issue as applied to a particular case; Caban addressed the gender discrimination issue.

State legislatures, too, have wrestled with the problem of striking a balance between according rights to parents and ensuring that terminations are handled quickly and efficiently so that adoptions can proceed. See secs. 48.40 et seq., Stats. 1981-82. Recognizing these areas of law as troublesome and ill-defined, I turn to a consideration of one aspect of the statute's constitutionality.

Sec. 48.415(6)(a)2 provides that one of the grounds for termination of a father's parental rights shall be the father's failure to assume parental responsibility. According to the

statute, failure to assume parental responsibility may be established by showing the following:

(1) the child was born out of wedlock and is not legitimated or adopted (48.415(6)(a));

(2) paternity was not adjudicated prior to the petition for termination of parental rights (48.415(6)(a));

(3) the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child (48.415(6)(a)2).

Sec. 48.415(6)(b) defines the phrase "substantial parental relationship" as meaning the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. It sets forth the following factors which the court may consider in evaluating whether a substantial parental relationship is established: "whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

The issue is whether this gender-based distinction, allowing the termination of a father's, but not a mother's, parental rights based on failure to assume parental responsibility violates the equal protection guarantees of the federal or state constitution.

A gender-based distinction can satisfy the equal protection guarantees of the United States Constitution if the statute "at least . . . serves 'important governmental objectives and [is] . . . substantially related to achievement of those objectives.'"[5] The party seeking to uphold the statute carries "the burden of showing an 'exceedingly persuasive justification'

for the classification."[6] The constitutionality of any gender-based distinction must be examined "free of fixed notions concerning the roles and abilities of males and females," and free of "archaic and stereotypic notions" about the roles of men and women. Mississippi University for Women v. Hogan, ___ U.S. ___, 50 L.W. 5068, 5070 (1982).

This test for determining whether a gender-based distinction is constitutional has been termed the "intermediate level" scrutiny test. I, of course, accept this test for federal constitutional purposes, but for Wisconsin state constitutional purpcses, I continue to adhere to the view that because gender-based classifications are inherently suspect, the "strict scrutiny" test is more appropriate. Marshfield Clinic v. Discher, 105 Wis.2d 506, note 8 at 524, 314 N.W.2d 326 (1982) (Abrahamson, J., dissenting). I continue to believe that any classification based on immutable personal characteristics is "suspect" and that gender is obviously an immutable personal characteristic. Gender is a "visible characteristic determined by causes not within the control of the individual. It bears no relation to ability to contribute to or participate in society." Hewitt v. Saif, 294 Or. 33, 653 P.2d 970, 977 (1982). I do not believe it is necessary to analyze this statute according to a strict scrutiny standard, however, because this statute can not withstand the lesser intermediate level of scrutiny.

I conclude that the statute on its face and as applied is unconstitutional under the state and federal constitutions because the means used to achieve the government's objectives are not "substantially related to the achievement of those objectives." I first consider whether the statute on its face is unconstitutional.

The statute is designed to achieve the important governmental objectives of promoting the best interests of the child, protecting the rights of interested third parties, and

ensuring promptness in and finality of the termination of parental rights to facilitate the child's adoption. I agree that these objectives are legitimate and important. Lehr v. Robertson, ___ U.S. ___, slip op., p. 18 (June 27, 1983); In the Interest of DLS, 112 Wis.2d 180, 187, ___ N.W.2d ___ (1983). Like its interest in voluntary termination proceedings, the state also has an interest in involuntary termination proceedings to ensure that the termination of parental rights is just. In the Interest of DLS, 112 Wis.2d 180, 185, ___ N.W.2d ___ (1983).

The statute can only be upheld, though, if the gender-based distinction in sec. 48.415 (a)(6)2 "is structured reasonably to further these ends," Caban v. Mohammed, 441 U.S. 380, 391 (1979).

While I agree with the majority that the failure of a parent to develop a substantial parental relationship with the child is a proper ground for the involuntary termination of parental rights, see Lehr v. Robertson, ___ U.S. ___, slip op., p. 12, that truth is not sufficient to enable the statute to withstand constitutional attack. The state must still answer the question of why the statutory criterion applies to male parents but not to female parents.

There appear to be three justifications for this gender-based distinction. First, it may be argued that the distinction is justified because one automatically knows the identity of the mother, but the father is neither known nor accessible. In this case, and in all cases in which sec. 48.415(6)(a)2 applies, that basis for distinguishing between an unwed mother and an unwed father is irrelevant because the substantial parental relationship criterion is applicable only after the putative father has been notified of the termination proceedings, has appeared, and his paternity has been adjudicated. The legislature has already provided a means to

terminate the parental rights of a father who cannot be identified or found. Sec. 48.415(a)(6)1.

The second possible justification for the gender-based distinction concerns the differences between the parents during the child's gestation period. The majority justifies the gender-based statute on the basis of the biological distinction between men and women concerning a child's gestation, just as it relies primarily on the father's actions during pregnancy to affirm the trial court's findings that the evidence fulfilled the statutory termination grounds (see Beilfuss, C.J., dissenting, slip op., p. 3). Because women can become pregnant and physically can carry children within their bodies, but men cannot, reasons the majority, the gender-based distinction is justified.

I do not dispute the fact that there are biological differences between men and women. But I do not agree that these biological differences are sufficient justifications for this gender-based statute. The United States Supreme Court has recently strenuously emphasized that a parent's "mere biological relationship" with a child is not accorded constitutional protection. Lehr v. Robertson, ___ U.S. ___, slip op., pp. 11-12 (June 27, 1983). "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Id., at ___, slip op., p. 11, quoting with approval from Caban v. Mohammed, supra, 441 U.S. at 397 (Stewart, J., dissenting), quoted with approval in the majority opinion, slip op., pp. 16-17. In Lehr, the Court distinguished between "a mere biological relationship and an actual relationship of parental responsibility" created by the parent's role in the child's life. Lehr at ___, slip op., p. 12, and p. 13, n.17. The Court in Lehr considered only the role of a biological father, because only that issue was before it, but the same reasoning applies to a biological mother. This reasoning

undermines the very premise of the majority's holding that the mere biological differences between the father and mother, that is, insemination versus pregnancy, justify a gender-based distinction as to grounds for termination of parental rights.

Even if the biological difference between man and woman can be considered as the basis for establishing different grounds for termination of the father's and mother's parental rights, the reasons based on biological differences pointed out by the majority as support for the gender-based distinction do not withstand scrutiny. According to the majority, a man, unlike a woman, has the choice whether to care for the unborn child by caring for the pregnant woman and should forfeit parental rights to the child if he does not fulfill his parental responsibility to the unborn child by taking care of the mother. The majority asserts that, as a matter of nature, "biology dictates that [the mother] provide care and support for a child during pregnancy [by taking care of herself]." Slip op., p. 22. The mother, as the carrier of the child, cannot, says the majority, choose not to accept and exercise significant responsibility for the care and protection of the child during pregnancy. The majority asserts that the woman's only option other than to exercise responsibility is to abort the pregnancy. Slip op., p. 13. The majority is, I suggest, mistaken about a woman's role during pregnancy.

Biology dictates only that a woman carry a child. It does not dictate that she show responsibility by providing proper care for herself (and thus the unborn child) or even that she love the child. The mother has control over prenatal care which, as the majority recognizes, is "important to the eventual health and well-being of an infant." Slip op., p. 10 and n.6. A woman can disregard the care and protection of the child during pregnancy by ignoring the importance of proper nutrition, medical care, and exercise, by smoking or ingesting dangerous drugs, by

overuse of caffeine and alcohol, by gaining too much or too little weight, by exposing herself to hazardous environmental elements, or by subjecting herself to stress. A woman's support and care of an unborn child are voluntary and important.[7]

The mother, by failing to take care of herself, as well as the father, by failing to take care of the pregnant woman, may fail to fulfill parental responsibilities to the unborn child. If such failure is a ground for terminating the father's rights, the majority gives no reason why it should not be a ground for terminating the mother's rights. Since the mother's role during pregnancy is generally more important than the father's, according to the majority's reasoning, it would appear that there is even more justification to terminate the mother's parental rights for failing to assume responsibility to the unborn child than the father's.

Although the statute requires the court to look at the relationship of the unwed father to the child after the child's birth, the majority confines its reasoning justifying the gender-based distinction to the gestation period or at most immediately following gestation, slip op., p. 21, because even it appears to recognize that the biological differences between unwed fathers and mothers cannot justify different treatment as to their voluntary failure to assume responsibility for the child after the child's birth.

Recognizing this fact, the majority, relying on Justice Stevens's dissenting opinion in Caban v. Mohammed, 441 U.S. 380, 389 (1979), concludes that the differences between unwed mothers as a class and unwed fathers might form a basis for a valid gender-based distinction regarding adoption proceedings where newborn infants are concerned. (Slip op., p. 20.) The Caban majority did not decide this issue, and the Court specifically concluded that even assuming a difference between the closeness of unwed mothers and unwed fathers to the child based on their

relationship to the child during pregnancy and immediately afterward, this generalized difference would not constitutionally support a gender-based distinction for purposes of adoption, and it "would become less acceptable as a basis for legislative distinctions as the age of the child increased." Caban v. Mohammed, supra, 441 U.S. at 388-89. Caban's analysis of equal protection and gender-based adoption laws was not overruled in or modified by Lehr.

Because none of the proposed justifications for the statute can withstand analysis, I conclude that the statute's gender-based distinctions are not substantially related to the governmental objectives and that the statute is unconstitutional on its face.

Even if this statute were held constitutional on its face, it is clearly unconstitutional as applied in this case. As Justice Stevens explained in Lehr v. Robertson, ___ U.S. ___, slip op., at p. 19 (June 27, 1983), a statute granting different rights to a mother and father regarding termination of their parental rights may not constitutionally be applied in those cases where the mother and father are in fact similarly situated with regard to their relationship with the child. The majority has generalized that the mother is naturally closer to her child and has the natural obligation to raise the child. In this case, though, the mother's relation to the child during pregnancy was not explored, but we do know that the mother voluntarily decided not to raise the child, placing the child outside her home within three days after its birth, for reasons that may very well stem from her love for the child and her desire to allow it to be adopted. The trial court found as a fact that the "child had no relationship with either parent. . . . " (emphasis added; slip op., p. 7). Accepting this finding of the circuit court, I must conclude that the mother and father in this case are similarly situated as to the child. Nonetheless, the statute treats the

two parents differently, for no apparent reason. If this mother refused to terminate her parental rights voluntarily, involuntary termination proceedings could not be instituted against her on the ground that she failed to establish a substantial parental relationship with the child because the statute does not apply to the unwed mother. When one takes into consideration the father's actual efforts to establish a relationship with the child by initiating paternity proceedings one month after the child's birth and expressing constant interest in the child, it is ironic that he, but not the mother, can have his parental rights involuntarily terminated on this ground and without a finding of unfitness. According to Lehr, this statute is unconstitutional as applied in this case.

I conclude that the statute systematically harms men by assuming that even those unwed fathers who come forth after a child's birth, assert and adjudicate their paternity, and make reasonable efforts under the circumstances of the case to maintain parental ties with their children are to be treated differently from the biological mother regardless of her parental relationship with this child. This type of systematic harm to men can only "be explained . . . as the product of habit, rather than analysis or reflection," and cannot withstand constitutional scrutiny. Lehr v. Robertson, ___ U.S. ___ (slip op., p. 17, n.24, June 27, 1983). Sec. 48.415(6)(a)2 subjects men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. Lehr v. Robertson, ___ U.S. ___ (slip op., pp. 17-18, June 27, 1983). Accordingly, I would hold that this statute violates the equal protection clauses of the United States and the Wisconsin constitutions. I dissent.

I am authorized to state that Justice Nathan S. Heffernan joins in this dissent.

[1] I only add that the majority treats termination of parental rights like a punishment for a crime, thus increasing the legislatively prescribed penalties for commission of a crime by adding a new penalty, loss of a child. Slip op., pp. 13, 19. The purpose of termination should be to permanently place children in accordance with their best interests, not to punish a parent. I would hold that the penalty of termination of parental rights for the commission of a crime is per se cruel and unusual punishment in violation of the United States Constitution, amends. VIII, XIV, and the Wisconsin Constitution, art I., sec. 6.

[2] Under this reasoning it is not necessary to reach any of the other issues presented in this case. A court can terminate parental rights involuntarily if one of the grounds for termination under sec. 48.415 is proved in a fact-finding hearing. Sec. 48.42(1)(c)2, Stats. 1981-82. See also In the Interest of DLS, 112 Wis.2d 180, 186, ___ N.W.2d ___ (1983). Only after the court finds that a statutory ground for termination of parental rights exists does the court reach the question of whether the parent whose rights are to be terminated is unfit. In this case the statutory ground set forth in the petition and argued at trial was the father's failure to assume parental responsibility. Sec. 48.415(6)(a)2. If the statutory ground is void because it violates the constitutions of this state and of the United States, the trial court could not involuntarily terminate the father's parental rights in this case, regardless of whether he was unfit as a parent. See slip op., pp. 18, 19.

[3] I find some of the majority's sociological observations questionable, but because they are only tangentially relevant to the legal issues presented in this case I do not discuss them.

[4] I question the majority's haste to conclude that Lehr v. Robertson makes superfluous any due process protections accorded by this state's statutes or constitution. The Supreme Court decided Lehr v. Robertson four days ago. This court has had only parts of two days to reflect on that case and the differences between the New York statutes involved in Lehr and the Wisconsin statutes. I would have preferred to give the parties and the state an opportunity to submit briefs on the possible impact of Lehr on the issues presented in this case to enable this court to give Lehr the considered reflection it deserves. Because the majority considers Lehr, I, too, reluctantly consider it.

[5] Mississippi University for Women v. Hogan, ___ U.S. ___, 50 L.W. 5068, 5070 (1982), quoting from Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 150 (1980). See also Lehr v. Robertson, ___ U.S. ___ slip op., pp. 17-18 (June 27, 1983); Craig v. Boren, 429 U.S. 190, 197 (1976); Caban v. Mohammed, 441 U.S. 380, 388 (1979).

[6] Mississippi University for Women v. Hogan, ___ U.S. ___, 50 L.W. 5068, 5070 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979).

7 See Castello, Getting Ready for Parenthood: A Manual for Expectant Mothers and Fathers, pp. 45-50 (1957); Hess and Hunt, Pickles and Ice Cream, The Complete Guide to Nutrition During Pregnancy (1982) passim; NIOSH, Guidelines on Pregnancy and Work (1977) passim; Russell, Eastman's Expectant Motherhood 48-87 (6th ed., 1977); Verrilli and Mueser, While Waiting: A Prenatal Guidebook, 25-46 (1982).

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND RELEASED

AUG 17 1982

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 82-087

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

In the Interest of Baby Girl K,
a person under the age of 18:

L.K.,

Petitioner-Respondent,

v.

B.B.,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Marathon county: LEO D. CROOKS, Judge. Affirmed.

FOLEY, P.J. B.B. appeals a judgment terminating his parental rights to Baby Girl K. His petition to bypass this court, sec. 808.05, Stats., and his motion for a three-judge panel, sec. 809.41, Stats., were denied. Because this court concludes that sec. 48.415(6)(a)2, Stats., does not violate B.B.'s right to equal protection and because the trial court findings supporting termination are not against the great weight

and clear preponderance of the evidence, the judgment is affirmed.

FACTS

Baby Girl K. was born out of wedlock to L.K. on March 17, 1981. B.B., the father of the child, was incarcerated in November, 1980, about five months into L.K.'s pregnancy. The child was placed in a foster home immediately after birth. B.B. filed a petition for determination of paternity, and L.K. filed a petition for the involuntary termination of B.B.'s parental rights. The court found that B.B. was the father of the child and terminated his parental rights.

At the hearing on the petition for termination, L.K. testified that the child had not been legitimated or adopted and that B.B. knew and publicly acknowledged paternity. She testified that during the period of her pregnancy between June and November, 1980, B.B. spent "every day" with her, but did not aid her in any way. She further testified that during her pregnancy, he once tried to strangle her and twice asked her to smuggle marijuana into prison for him. At the time of these incidents, L.K. was a minor.

CONSTITUTIONALITY OF STATUTE

B.B. claims that the gender-based classific ion in sec. 48.415(6)(a)2 denies him equal protection of the law and is therefore unconstitutional. Section 48.415(6)(a)2 provides that an unwed father who fails to develop a substantial relationship with his child is subject to an involuntary termination of his parental rights. There is no corresponding provision for the unwed mother of the child.

This court concludes that the application of sec. 48.415(6)(a)2 to B.B. does not unconstitutionally deny him equal protection of the law. The burden was on B.B. to prove that the sec. 48.415(6)(a)2 classification was unreasonable. See State v. Mertes, 60 Wis.2d 414, 416-17, 210 N.W.2d 741, 743 (1973). A court will uphold the classification when it is substantially related to achieving an important governmental objective. State v. Hill, 91 Wis.2d 446, 451, 283 N.W.2d 451, 453 (Ct. App. 1979).

The gender-based classification in sec. 48.415(6)(a)2 is reasonable, and the statute does achieve the important governmental objective of promoting the best interests of the child. It is reasonable to treat fathers differently from mothers because a father's relationship with a child is

necessarily different from a mother's relationship, both before and after a child's birth. A father does not get pregnant. Fatherhood must therefore be established while motherhood cannot be questioned. Until paternity is adjudicated, a father cannot be made to support his child. Conversely, a mother has no choice but to support her child, regardless of any court adjudication of her maternity. Additionally, during the pregnancy, a mother must always have a substantial relationship with her child.

The objective of sec. 48.415(6)(a)2 is to promote the best interests of the child. See sec. 48.01(2), Stats. This is an important governmental objective. Clearly, it is in a child's best interests to have a father who is concerned with and interested in the child's well-being, care, and support. By requiring a father to show this concern and interest to avoid termination of his parental rights, the statute promotes the best interests of the child.

SUFFICIENCY OF EVIDENCE

The trial court finding that termination of B.B.'s parental rights would be in the best interests of Baby Girl K is not against the great weight and clear preponderance of the evidence and therefore will not be upset on appeal. See G.G.D. v. State, 97 Wis.2d 1, 12, 292 N.W.2d 853, 858 (1980). On the

contrary, the finding is supported by the overwhelming weight of the evidence. The child had no relationships with B.B. or other family members, and termination of B.B.'s parental rights would certainly not be harmful to the child. The child has been in foster care since birth and has never known her biological parents. Additionally, if B.B.'s parental rights are terminated, the child can enter immediately into a family relationship with more stability. B.B., conversely, could not personally care for the child until his release from prison. His suggestion that the child be placed with his parents until his release was justifiably not acceptable to the court.

This court also concludes that the evidence was sufficient to support a finding that B.B. had an opportunity to develop a substantial relationship with Baby Girl K. Before termination is authorized by sec. 48.415(6)(a)2, the parent whose rights are being terminated must have had such opportunity. B.B. claims that his imprisonment denied him the opportunity to develop a substantial relationship.

Although it was more difficult for B.B. to develop a parental relationship with his child because he was in prison, it was not impossible. As noted by the court, there was no evidence of attempts to send cards or gifts to the child. B.B. also had the opportunity to exercise significant responsibility

for the child before his imprisonment. He could have assumed at least some responsibility for the support, care, and comfort of the mother. The trial court properly considered this period of time in determining whether such a relationship has been developed. Section 48.415(6)(b) specifically provides that the court may consider the period of the pregnancy, and with good reason. This is an important period for both the child and the mother. The putative father's efforts and interest during the pregnancy may also bear significantly on his sincerity in later opposing the termination of his parental rights and on his concern for his child.

NECESSITY OF FINDING OF UNFITNESS

This court concludes that a specific finding that B.B. was an unfit parent was not necessary to terminate his parental rights. When termination of parental rights is so clearly in a child's best interests, this court should attempt to uphold the termination. Nevertheless, B.B. argues that the court must make a finding that he is an unfit parent before it may terminate his parental rights. B.B. relies on Quilloin v. Walcott, 434 U.S. 246 (1978), and Interest of J.L.W., 102 Wis.2d 118, 306 N.W.2d 46 (1981).

J.L.W. does not control the disposition of this appeal. In J.L.W., the court held that a finding of unfitness had to be made before the court could terminate a mother's parental rights. This holding was carefully limited to the specific facts presented in the case. Id. at 135, 306 N.W.2d at 54. The facts in J.L.W. and in this case differ substantially. The mother in J.L.W. had legal custody of the child, and she also had physical custody of the child for the first four months of the child's life. B.B. has never had either legal or physical custody of Baby Girl K. In J.L.W., no finding of the mother's unfitness as a parent was made, nor could such a finding be sustained on the record. Although a finding that B.B. was an unfit parent was not made, such a finding is clearly sustained by the record.

The trial court found that prior to his incarceration, B.B. had funds available to provide care and support for L.K. but failed to do so. The court also considered the incident of physical violence by B.B. toward the mother during her pregnancy and the fact that he requested that she smuggle marijuana into the prison for him twice during her pregnancy. At the very least, B.B.'s conduct demonstrates a complete indifference to the welfare of the child. The court also found that although B.B. was interested in the child, he

failed to carry through with actions that would establish a substantial parental relationship.

Additionally, _..L.W._ recognized that there were circumstances such as those in Quilloin in which due process did not preclude a termination without a finding that the parent was unfit. There are similar circumstances present in this case. B.B. has never been a member of his child's family and, in fact, has never seen the child. He also has never had custody of the child. Additionally, he is presently incarcerated and he has a criminal record. Individually, these circumstances would not necessarily support a termination without a finding of unfitness. When all the circumstances are combined, however, and balanced against the persuasive evidence of the child's best interests, they are sufficient to permit the termination of B.B.'s parental rights.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN | CIRCUIT COURT CHILDRENS DIVISION, BR. II | MARATHON COUNTY

In the interest of:

BABY GIRL KRUEGER,
a person under the age of 18.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT - TERMINATION OF PARENTAL RIGHTS

CASE No. 81-JU-391B

FACT FINDING HEARING:

PRESIDING JUDGE: Leo D. Crooks
Place: Marathon County Circuit Court Branch III
Wausau, WI 54401

Date: December 23, 1981

Appearances: Petitioner, Lisa Marie Krueger
Petitioner's attorney, Patrick M. Brady
Respondent, Bryon Buhse
Respondent's attorney, Gerhardt F. Getzin
Guardian ad litem, Attorney James Kurth
Attorney for Marathon County Department of Social Services, Weldon Nelson

I, the Judge, before whom this matter was tried, do hereby make the findings of fact, conclusions of law and judgment:

FINDINGS OF FACT

1. The petitioner in this action is Lisa Marie Krueger, mother of Baby Girl Krueger, who resides at 705 East Lakeshore Drive, Wausau, Wisconsin 54401.

2. The respondent, Bryon Buhse, resides at Kettle Morraine Correctional Facility, P. O. Box 51, Plymouth, Wisconsin 53703.

3. The petitioner, Lisa Marie Krueger, and respondent, Bryon Buhse, are the natural parents of Baby Girl Krueger, born March 17, 1981. That said child was born out of wedlock, has not been subsequently legitimated or adopted.

4. That at the time of filing of the petition herein, paternity of Baby Girl Krueger had not been adjudicated but that the paternity of Bryon Buhse with respect to Baby Girl Krueger was adjudicated prior to the commencement of the hearing in this matter.

5. That all persons who were proper parties to this action were personally served with the summons and petition herein, received proper notice of all hearing dates and were given the opportunity to appear and testify in person.

6. That Baby Girl Krueger has resided in foster care at 306 Prospect Avenue, Wausau, Wisconsin 54401 since leaving the hospital at the time of her birth.

50

B

7. That during the period that petitioner was pregnant with Baby Girl Krueger, the respondent, Bryon Buhse, on two occasions, wrote letters to petitioner asking her to smuggle marijuana into the Kettle Morraine Correctional Facility for his personal use.

8. That on one occasion during the period that petitioner was pregnant with Baby Girl Krueger the respondent, Bryon Buhse, physically assaulted petitioner.

9. That the respondent, Bryon Buhse, neglected to provide care or support to petitioner during her pregnancy even though respondent, Bryon Buhse, had the opportunity and ability to do so.

10. That respondent, Bryon Buhse, failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl Krueger such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts.

11. That respondent, Bryon Bushe, failed to make any attempt to contribute towards the medical expenses of petitioner occasioned by her pregnancy and the subsequent delivery of Baby Girl Krueger.

12. That there is a high degree of likelihood that Baby Girl Krueger will be adopted in the event the parental rights of Bryon Buhse are terminated.

13. That Baby Girl Krueger is in good health and at the time of placement of foster care, was only three (3) days old.

14. That the child has had no relationship with either parent or other family members so that it would not be harmful to said child to sever such relationships.

15. That in the event the parental rights of Bryon Buhse are terminated, that the child will be able to enter into a more stable and permanent family relationship.

CONCLUSIONS OF LAW AND JUDGMENT

16. That respondent, Bryon Buhse, has failed to assume parental responsiblity for Baby Girl Krueger within the meaning of Sec. 48.415 (6), Wis. Stats.

17. That it is in the best interest of Baby Girl Krueger that the parental rights of her father, Bryon Buhse, be terminated.

18. The parental rights of Bryon Buhse to his minor child, Baby Girl Krueger, d/o/b March 17, 1980, are permanently terminated as of the date of this judgment pursuant to Sec. 48.427, Wis. Stats.

JUDGMENT IS HEREBY RENDERED AND THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

Dated this 30th day of December, 1981 but effective December 23,1981.

BY THE COURT:

/s/
LEO D. CROOKS, Circuit Judge

Approved, December 28th, 1981

/s/
Patrick M. Brady, Attorney for Petitioner

Approved December 29th, 1981

/s/
James Kurth, Guardian ad Litem

Patrick Brady Law Office
215 Grand Avenue
Wausau, WI 54401
Telephone: (715) 842-9822

APPENDIX D

DCS-SS-19A (11-78)

DECLARATION OF PATERNAL INTEREST*

TO: Division of Community Services
Bureau for Children, Youth and Families
1 West Wilson Street
Madison, Wisconsin 53702

I have reason to believe that I may be the father of a child born on

March 10, 1981 (Month, Year) or expected to be born on _____ (Month, Year).

Baby Girl Krueger

I am hereby declaring my interest in matters affecting this child.

Child's mother's name: Lisa Marie Krueger

Mother's approximate age: 17

Mother's last known address: 10 E. Lakeshore Dr.

Johnson, Wisc. 54101

(City, State, Zip Code)

My name is Wayne Purse
(Type or Print)

My address is Box 31

Plymouth, WI 53073
(City, State, Zip Code)

Wayne Purse
(Signature)

APR 13 1981

*Section 48.025 (Wisconsin Statutes) provides for filing a Declaration of Paternal Interest in matters affecting children.

(Forward top two copies to Division of Community Services at above address; keep third copy for your records.)

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

In the Interest of Baby Girl K.,
a person under the age of 18;

LISA KRUEGER,

Petitioner-Respondent-Respondent,

v. Case No. 82-087

BRYON BUHSE,

Respondent-Appellant-Petitioner.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bryon Buhse, the petitioner-appellant-petitioner above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wisconsin, entered July 1, 1983, affirming the judgment of termination of Bryon Buhse's parental rights concerning Baby Girl K., said judgment of the trial court entered on December 29, 1981.

This appeal is taken pursuant to 28 U.S.C. s. 1257(2).

Copies of this document have been served on the following attorneys representing the State of Wisconsin and all parties of record:

Bronson C. LaFollette, Attorney General, State of Wisconsin
114 East Capital, Madison, WI 53702
Thomas Finley, Assistant Corporation Counsel, Marathon County
Court House, Wausau, WI 54401
James Kurth, Guardian Ad Litem for Baby Girl K.
128 Grand Avenue, P. O. Box 1547, Wausau, WI 54401
Patrick M. Brady, Attorney for Lisa Krueger
107 Sixth Street, P. O. Box 898, Wausau, WI 54401

Dated this 29th day of July, 1983.

GETZIN & JANNETTA

BY: _____
Gerhardt F. Getzin
Attorney for Petitioner
408 Third Street, Suite 307
P. O. Box 951
Wausau, WI 54401

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SEP 30 1983
OFFICE OF THE CLERK
SUPREME COURT U.S.

83-5528

IN THE UNITED STATES SUPREME COURT

In the Matter of BABY GIRL K.,

B. B.,

Appellant,

v.

L. K.,

Appellee.

MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

Bryon Buhse, the appellant in the above matter, through his attorney, Gerhardt F. Getzin, moves the Court for allowance to proceed on this appeal in forma pauperis as follows:

1. A jurisdictional statement has been filed with this motion regarding an appeal which appellant seeks from a judgment of the Supreme Court of the State of Wisconsin.

2. Appellant is unable to prepay the fees and costs or give security therefor regarding said appeal to this Court.

3. The nature of the action is an appeal from the Supreme Court of the State of Wisconsin which has issued a judgment affirming termination of the appellant's parental rights to his child and an appeal from said court's judgment holding that a Wisconsin statute does not violate appellant's rights under the United States Constitution.

4. Appellant believes that he is entitled to redress of said court's judgment and is seeking to have this Court reverse the judgment and declare the Wisconsin statute unconstitutional since it discriminates against unwed fathers.

5. Appellant's attorney is admitted to the Bar of United States Supreme Court.

6. The state courts in the proceedings referred to in the jurisdictional statement filed with this motion granted leave to proceed in forma pauperis in the sense that appellant's attorney was appointed

Wisconsin courts since the Wisconsin State Public Defender found appellant to be indigent.

7. Attached to this motion is an affidavit in support settling forth facts showing appellant's indigency.

WHEREFORE, appellant in the above matter through his attorney moves this Court for an order granting leave to proceed in forma pauperis and for an order appointing Gerhardt F. Getzin as appellant's attorney in this Court, all pursuant to United States Supreme Court Rule 46.

Dated this 28th day of September, 1983.

CETZIN & JANNETTA

BY:

Gerhardt F. Getzin
Attorney for Appellant
408 Third Street, Suite 307
P. O. Box 951
Wausau, WI 54401
(715)842-0823

IN THE UNITED STATES SUPREME COURT

In the Matter of BABY GIRL K.,

B. B.,

Appellant,

v.

L. K.,

Appellee.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, B. B., being first duly sworn, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security thereof; that I believe I am entitled to redress; and that issues which I desire to present on appeal appear in the jurisdictional statement filed with this motion.

I further swear that the allegations made in the motion to which this affidavit is attached are true and that the information provided below in the numbered paragraphs relating to my ability to pay the cost of prosecuting this appeal are true.

1. I am not presently employed, and the date of my last employment and the amount of the salary and wages per month were as follows:

May, 1980, $500.00 per month

2. I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources within the past twelve months.

3. I do not own any cash, checking or savings accounts.

4. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property exclusing household furnishings and clothing.

5. If my parental rights are not terminated, I may be responsible for the support of my daughter who is referred to in the jurisdictional statement.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Bryan Buhse

Subscribed and sworn to before me
this 28th day of September, 1983.

Gerhardt F. Getzin, Notary Public
Marathon County, Wisconsin
My commission is permanent.

DISTRIBUTED
JAN 20 '84

ORIGINAL

Supreme Court, U.S.
FILED
JAN 20 1984
ALEXANDER L. STEVAS
CLERK

No. 83-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE INTEREST OF BABY GIRL K.,

A PERSON UNDER THE AGE OF 18

BRYON BUHSE, Appellant

v.

LISA KRUEGER, Appellee.

ON APPEAL FROM THE SUPREME COURT

OF THE STATE OF WISCONSIN

MOTION TO DISMISS OR AFFIRM

KORITZINSKY, NEIDER, LANGER & ROBERSON
By: Judith Sperling Newton
802 East Gorham Street
Madison, Wisconsin 53703
(608) 251-0998

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INTRODUCTION

Appellant presents three issues to this Court on appeal:

1. Does Wisconsin Statutes section 48.415(6)(a)2 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by unjustly discriminating against unwed fathers?

2. Does Wisconsin Statutes section 48.415(6)(a)2, as applied, violate the rights of unwed fathers under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, since it was held that a father's rights can be terminated for action or inaction during the first five months of the mother's pregnancy?

3. Were appellant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated by a judgment terminating his parental rights to a child with whom he had not established a relationship, in the absence of an explicit finding of parental unfitness?

Appellee moves this Court to dismiss the appeal as to issues 2 and 3, because they were never properly raised in, or decided by, any Wisconsin court as required by S.C.R. 16(1)(b).

Appellee moves this Court to dismiss the appeal as to issue 1, on the grounds that it does not present a substantial federal question as required by S.C.R. 16(1)(b), and that the issue has already been adequately addressed and resolved by this Court.

Alternatively, appellee moves this Court summarily to affirm the Wisconsin decisions holding that Wis. Stat. s. 48.415(6)(a)2 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution, because the gender-based distinction employed by the statute is rational and is substantially related to important governmental objectives.

Appellee also, alternatively, moves this Court summarily to affirm the Wisconsin decisions, because the statute does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because a putative father is given an opportunity to establish a substantial relationship with his child both before and after birth, and because the Due Process Clause does not require a finding of unfitness in order to terminate a putative father's parental rights when he has never established a substantial relationship with his child, and when such termination is in the best interest of the child.

STATEMENT OF FACTS

In June, 1980, L.K., appellee in this matter, became pregnant with Baby Girl K. L.K. was 15 years old at the time and unmarried. Approximately five months later B.B., appellant and putative father of Baby Girl K., was incarcerated at the Kettle Moraine Correctional Institution, in Plymouth, Wisconsin, on his second burglary conviction.

Baby Girl K. was born on March 17, 1981. On March 20, 1981, she was placed in a foster home where she has resided to this day. On March 25, 1981, the Marathon County Department of Social Services filed a petition for the voluntary termination of both parents' parental rights. Although appellant had initially consented to the termination of his rights, he subsequently changed his mind, and the petition was withdrawn. On August 3, 1981, appellant filed a petition for determination of paternity

and custody. On August 4, 1981, the Department of Social Services filed a petition for determination that the child was in need of protection and services, known in Wisconsin as a "CHIPS proceeding." On August 13, 1981, appellee filed a petition for termination of appellant's parental rights under Wis. Stat. s. 48.415(6)(a)2. All the above actions were consolidated.

On December 23, 1981, the trial court held that appellant had "failed to assume parental responsibility as set forth and defined in s. 48.415(6)(a)2 and subsection (6)(b)." In its Findings of Fact, the court found, among other things:

> (1) That appellant had failed to provide care or financial support for appellee and Baby Girl K., both during the pregnancy and after birth, even though he had had the opportunity and the ability to do so;
>
> (2) That appellant had failed to present any evidence of attempts on his part to establish a substantial parental relationship;
>
> (3) That appellant had physically assaulted appellee during her pregnancy;
>
> (4) That appellant had written to appellee while he was incarcerated and twice requested that she smuggle marijuana into prison for him;
>
> (5) That, if appellant's parental rights were terminated, there was a good chance that Baby Girl K. would be adopted by her foster parents.

The court found as a matter of law "[t]hat it is in the best interest of Baby Girl [K.] that the parental rights of her father, [B.B.], be terminated." See, Appendix C.

Appellant appealed to the Wisconsin Court of Appeals, and the judgment was affirmed. The Court of Appeals concluded that the evidence was sufficient to support a finding that appellant had had an opportunity to develop a substantial relationship with Baby Girl K. and had failed to do so. The Court of Appeals held that the trial court's finding that the termination of appellant's

parental rights would be in the best interest of Baby Girl K. was not against the great weight and clear preponderance of the evidence. The Court of Appeals further determined that a specific finding of parental unfitness was unnecessary to terminate appellant's parental rights, and that even though a finding of unfitness was not required, such a finding "is clearly sustained by the record." Finally, the Court of Appeals concluded that Wis. Stat. s. 48.415(6)(a)2 did not unconstitutionally deny appellant equal protection of the law. See, Appendix B.

Appellant next appealed to the Wisconsin Supreme Court which also affirmed the judgment. See, Appendix A: In the Interest of Baby Girl K., 113 Wis. 2d 429, ___ N.W.2d ___ (1983).

Appellant now appeals to the United States Supreme Court. James Kurth, Attorney at Law and Baby Girl K's Guardian ad Litem, joins appellee in her Motion to Dismiss or Affirm. See, Appendix D.

To date, Baby Girl K. has spent all but the first three days of her life with the foster parents who now seek to adopt her legally. Appellee has consented to this adoption. Appellant, who has never seen Baby Girl K. nor contributed to her support, and who has established no relationship with the child beyond a biological one, is the only individual preventing this adoption.

ARGUMENT

I. THE DUE PROCESS ISSUES WERE NOT PROPERLY RAISED IN ANY WISCONSIN COURT AS REQUIRED BY S.C.R. 16(1)(b).

Appellant, Bryon Buhse, attempts to invoke this Court's jurisdiction on appeal and presents the Court with three issues allegedly warranting briefing, oral argument,

and consideration by the Justices on the merits. Before the United States Supreme Court may invoke appellate jurisdiction to review a decision by a state court, certain conditions precedent must be met. A substantial federal question must be raised in a timely manner and in conformity with the state procedural rules. The state court must expressly rule on the federal question, and the court's judgment must not be capable of construction resting on adequate non-federal grounds. The federal question must then be ruled upon by the highest court in the state from which the appeal emanates. S.C.R. 16(1)(a),(b), and (c).

Appellee, Lisa Krueger, moves this Court to dismiss the present appeal as it relates to two of the three issues presented, on the grounds that the federal questions sought to be reviewed were not timely nor properly raised, and were not expressly acted upon in Wisconsin by the trial court, Court of Appeals, or Supreme Court, as required by S.C.R. 16(1)(b).

A. A Challenge On Federal Grounds Must Be Explicit.

" ... [I]t is necessary for appeal purposes that the litigant make specific and plain in the state court his contention that the application of the statute to his particular circumstances would make the statute void under federal law." R. Stern and E. Gressman, Supreme Court Practice, at 163 (5th Ed. 1978). It is not enough merely to refer to the "Constitution and Laws of the United States," Oxley Stove Co. v. Butler County, 166 U.S. 648 (1897), or "due process of law," Bowe v. Scott, 233 U.S. 658, 664-665 (1914); Brady v. Maryland, 373 U.S. 83, 91 (1967), or the "Constitution of the United States." Herndon v. Georgia, 295 U.S. 441, 442-443 (1935). "An attack upon a statute upon the ground that it is in

violation of the Constitution of the United States, without further specification, does not raise a federal question." Id. at 442-443. Alleging "that the statute is contrary to the Constitution of the United States, without calling attention to the provision of that instrument whose protection is denied to the plaintiff in effort,...is clearly insufficient. Farney v. Towle, 1 Black, 350." Harding v. Illinois, 196 U.S. 78, 88 (1904). Care must be taken to make reference to the particular clause of the United States Constitution under which the statute is being challenged, as well as the rights claimed thereunder.

Furthermore, if the claim is made that a state statute is "unconstitutional" or that it denies "constitutional rights," it is assumed that reference is being made to the state constitution and rights thereunder, rather than to the United States Constitution. Bryant v. Zimmerman, 278 U.S. 63, 67-68 (1928). Similarly, if a state has a due process clause, reference simply to a violation of "due process" will be deemed to relate to the state clause. McDonald v. Oregon Navigation Co., 233 U.S. 665 (1914).

B. Appellant Raised No Constitutional Challenge To Wis. Stat. s. 48.415(6)(a)2 On Due Process Grounds Prior To The Present Appeal.

Appellant, in his Jurisdictional Statement, presents three issues to this Court on appeal:

1. Does Wisconsin Statutes section 48.415(6)(a)2 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by unjustly discriminating against unwed fathers?

2. Does Wisconsin Statutes section 48.415(6)(a)2, as applied, violate the rights of unwed fathers under the Due Process Clause of the Fourteenth Amendment to the United

States Constitution, since it was held that a father's rights can be terminated for action or inaction during the first five months of the mother's pregnancy?

3. Were appellant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution violated by a judgment terminating his parental rights to a child with whom he had not established a relationship, in the absence of an explicit finding of parental unfitness?

Of the three issues presented above, only issue 1 was ever raised in any form in any court prior to the present appeal. Contrast appellant's present formulation of the issues to his formulation in his briefs at the Wisconsin Court of Appeals and the Wisconsin Supreme Court levels:

Appellant's Argument To the Wisconsin Court of Appeals:

I. Wis. Stat. Section 48.415(6)(a)2 Violates The Equal Protection Clause Of The United States Constitution

II. Wis. Stat. Section 48.415(6)2 Does Not Allow For Termination Of Parental Rights Where The Father Did Not Have Opportunity To Exercise Significant Parental Responsibility

III. Insufficient Findings Were Made By The Trial Court To Support A Termination Of Parental Rights

See, Appendix G at 1.

Appellant's Argument To the Wisconsin Supreme Court:

I. Standard of Review: This Court May Independently Review the Questions of Law Presented

II. The Trial Court Did Not Make Sufficient Findings To Support A Termination Of Parental Rights

III. Wis. Stat. Section 48.415(6)(a)2 Does Not Allow For Termination Of Parental Rights Where The Father Did Not Have The Opportunity To Exercise Significant Parental Responsibility

IV. Wis. Stat. Section 48.415(6)(a)2 Violates The Equal Protection Clause Of The 14th Amendment To The United States Constitution

See, Appendix E at 1.

It is clear that appellant has properly raised only an equal protection challenge to the Wisconsin statute. At no time in his briefs to the Wisconsin Court of Appeals or to the Wisconsin Supreme Court, did appellant challenge the validity of the statute in question on federal due process grounds with the specificity required by S.C.R. 16. Indeed, he did not raise the question in even a vague, inadequate form by way of reference to the United States Constitution or the Fourteenth Amendment. See, Appendices E, F, and G.

II. NO WISCONSIN COURT EXPRESSLY CONSIDERED OR ACTED UPON ANY FEDERAL DUE PROCESS CHALLENGE TO WIS. STAT. s. 48.415(6)(a)2.

The Wisconsin trial court's Findings of Fact and Conclusions of Law and the Wisconsin Court of Appeals and Supreme Court decisions reveal that none of these courts considered, much less specifically acted upon, any federal challenge to the statute on due process grounds. See, Appendices A, B, and C. Indeed, the words "due process" do not appear even once in the trial court's Findings of Fact and Conclusions of Law. The Wisconsin Court of Appeals decision mentions the words "due process" but once and then in reference to another case: "Additionally, J.L.W. recognized that there were circumstances such as those in Quilloin in which due process did not preclude a termination without a finding that the parent was unfit." See, Appendix B at 8.

As earlier stated, the mere reference to "due process" does not in itself raise a federal question. Additionally, the context of the statement indicates that

the court is not considering the constitutionality of the Wisconsin statute under federal law, but is merely determining the proper construction of the statute.

Similarly, the Wisconsin Supreme Court does not consider the constitutionality of the statute on federal due process grounds. The court's concern is rather with the proper construction of the statute under Wisconsin law. This is not surprising as no federal due process challenge was ever made. Consider how the Wisconsin Supreme Court frames and answers the issues to be decided:

> There are four issues presented on review. The first issue is: Does s. 48.405(6)(a)2 permit termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the state prison system from the fifth month of the mother's pregnancy?
>
> The second issue is: Was the termination of B.B.'s parental rights under the provisions of s. 48.415(6)(a)2, Stats. properly ordered here?
>
> The third issue is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under s. 48.415(6)(a)2, Stats?
>
> The final issue is: Does s. 48.415(6), Stats. violate the Equal Protection Clause of the Fourteenth Amendment?
>
> We conclude that the mere fact that the father of the child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude possible termination of his parental rights under s. 48.415(6)(a)2, Stats. We also conclude that due process does not require a finding of parental unfitness where the father has failed to establish a substantial parental relationship under s. 48.415(6)(a)2. We determine that the trial court properly terminated B.B.'s parental rights under s. 48.415(6)(a)2, Stats.
>
> Finally, we conclude that s. 48.415(6)(b)2, Stats. does not violate the Equal Protection Clause of the Fourteenth Amendment.

Appendix A: Baby Girl K., supra p. 4 at 431-432.

Again, the court is engaged in the determination of the proper construction of the statute, and the sole reference to due process relates to the court's construction of the statute, not the constitutionality of the statute under the Fourteenth Amendment to the United States Constitution.

> It should be emphasized that in respect to the construction of state statutes, the state court's views are completely non-reviewable by the Supreme Court. If the sole basis of the decision is one of construction, the case cannot be the subject of either appeal or certiorari.

Supreme Court Practice, supra p. 5, at 213. See also, Beck v. Washington, 396 U.S. 541, 549-550 (1962).

In their determination of the proper construction to be accorded Wis. Stat. s. 48.415(6)(a)2, the Wisconsin justices relied on federal, as well as state, cases. This fact does not confer jurisdiction on this Court, nor does it lead to the conclusion that the justices were doing anything but construing their own state statute:

> That the state court may be influenced by the reasoning of our opinions makes no difference. The state court may be persuaded by majority opinions in this Court or it may prefer the reasoning of dissenting judges, but the judgment of the state court upon the application of its own constitution remains a judgment which we are without jurisdiction to review.

Minnesota v. National Tea Co., 309 U.S. 551, 558-559 (1940).

Thus, because the record is void of any evidence that appellant challenged the Wisconsin statute on federal due process grounds in a timely or proper manner, and because no Wisconsin court expressly acted upon such a properly presented federal question, appellee asserts that this Court is without jurisdiction to decide the federal due process questions raised by appellant, and moves the Court to dismiss the appeal as to issues 2 and 3 presented by appellant.

III. THE ONLY FEDERAL QUESTION PROPERLY RAISED BY APPELLANT AND EXPRESSLY CONSIDERED BY A WISCONSIN COURT SHOULD BE DISMISSED, BECAUSE IT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION AS REQUIRED BY S.C.R. 16(1)(b).

The Wisconsin trial court, Court of Appeals and Supreme Court all determined that appellant, Byron Buhse, had failed to establish a substantial relationship with his putative daughter, Baby Girl K., as required under Wis. Stat. s. 48.415(6)(a)2. See, Appendices A: Baby Girl K., supra p. 4 at 440-441, B at 5, and C at 2. This determination involved the construction of a Wisconsin statute, and as noted above, this Court has no jurisdiction to review such a judgment. Furthermore, " ... where the validity of the statute has been sustained in the face of federal objections, the Supreme Court on appeal must accept the state court's construction of the statute and proceed to test the validity on that basis. Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 513 (1933); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959)." Supreme Court Practice, supra p. 5 at 165.

Appellant claims the Wisconsin statute "violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, since it unjustly discriminates against unwed fathers." Appellee asserts that, because the putative father in the present case failed to establish a substantial relationship with his daughter, he does not have a constitutionally protected right which is capable of violation.

In Lehr v. Robertson, _____ U.S. _____ (1983), Slip Opinion No. 81-1756, this Court determined that a New York statute allowing a mother, but not a putative father, to veto the adoption of their child was not violated on either due process or equal protection grounds. Citing

Caban v. Mohammed, 441 U.S. 380, 397 (1979), the Court states, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Lehr, supra p. 11, at 11. " ...[I]f and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process." Caban, supra at 414; Lehr, supra p. 11, at 12. (Emphasis added.)

With respect to equal protection, "[t]he Court made it clear that if the father had not come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." Caban, supra at 392; Lehr, supra p. 11, at 19. "Nor were appellant's rights under the Equal Protection Clause violated. Because he has never established a substantial relationship with his child, the New York statutes at issue did not operate to deny him equal protection." Id. at 19.

In Orsini v. Blasi, 423 U.S. 1042 (1976), the father of a child born out of wedlock sought appeal to this Court from a decision by the New York Court of Appeals upholding the same statute at issue in Caban. The Court dismissed the appeal, having determined that, since no father-child relationship had been established, there was no interest to protect and no federal question to be decided. "Because of the thinness and academic nature of the parent-child relationship revealed in Malpica-Orsini v. Blasi, 36 N.Y.2d 568, 331 N.E.2d 486 (1975), it is apparent that the father there did not have at stake such a substantial interest as to warrant this Court's

jurisdiction to review the constitutionality of the statute." Caban, supra p. 12, at 397.

Because the Wisconsin courts have determined that no father-child relationship was ever formed in the present case, appellant has no constitutionally protected right which is capable of violation by the Wisconsin statute. Appellee, therefore, moves this Court to dismiss the present appeal as to issue 1 on the grounds that it does not present a substantial federal question as mandated by S.C.R. 16(1)(b).

IV. THE ONLY FEDERAL QUESTION PROPERLY RAISED HAS ALREADY BEEN DECIDED BY THIS COURT.

The issue raised by appellant as to the parental rights of an unwed putative father under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution has already been fully briefed, argued, and decided on the merits by this Court in Lehr v. Robertson, supra p. 11; Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, supra p. 12; and Stanley v. Illinois, 405 U.S. 645 (1972).[1]

The Wisconsin Court of Appeals and Wisconsin Supreme Court held that Wis. Stat. s. 48.145(6)(a)2 did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because the gender-based classification was rational, and because it was substantially related to the accomplishment of important state objectives:

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[1] Indeed, these cases also decide, in favor of appellee, the two due process issues which appellant failed properly to raise at the lower court levels and attempts to raise for the first time here on appeal.

> And, as the United States Supreme Court in Lehr noted, "if the father had not come forward to participate in the rearing of his child, nothing in the Equal Protection clause [would] preclud[e] the State from withholding from him the privilege of vetoing the adoption of that child." Slip Op. p. 19. Here, while termination of parental rights rather than the availability of a veto over the child's adoption is at issue, the equal protection question is substantially the same.

Appendix A: Baby Girl K., supra p. 4, at 450-451.

Because the decisions of the Wisconsin courts are consistent with this Court's decisions with respect to the equal protection issue raised by appellant, appellee moves the Court either summarily to affirm the decision or to dismiss the appeal on the grounds that the question has already been presented to, and resolved by, this Court.

V. WIS. STAT. s. 48.415(6)(a)2 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Intermediate Standard of Review Is Appropriate For Cases Involving Gender-Based Classifications.

When asserting that a state statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, it is not enough merely to show that the statute treats one group of individuals differently from another. "This Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of people in different ways. Reed v. Reed, 404 U.S. 71, (1971). See also, Barbier v. Connelly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Williamson v. Lee Optical, 348 U.S. 483 (1955); McDonald v. Board of Election Commissioner, 394 U.S. 802 (1968).

This Court has, through a long series of cases, articulated an intermediate standard of review for classifications based on gender.

Some commentators have referred to this intermediate standard as the "strict reasonableness" test. See, Babcock, Freedman, Norton, and Ross, Note: The Evolution of New Constitutional Standard for Reviewing Discriminatory Classificatons, Sex Discrimination and the Law (1975) pp. 120-125 at 122. Others call it the "substantial relationship-important interest" test. See, Nowak, Rotunda, and Young, Constitutional Law (1978) at 607 et seq (1978). Perhaps the best statement of this standard is that in order "to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

First utilized in Reed v. Reed, supra p. 14, this intermediate approach has been consistently applied in the Court's review of gender-based classifications for more than a decade. In cases where a statute meets a significant governmental objective through the imposition of a substantially related gender-based classification, this Court has upheld the statute. Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Vorchheimer v. School District, 430 U.S. 703 (1977); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Boles, 433 U.S. 282 (1979); Lewis v. Cowen, 435 U.S. 948 (1978) aff'd 443 F. Supp. 544 (E.D.Pa. 1977); Parham v. Hughes, 441 U.S. 347 (1979);

Personnel Administrator of Mass. v. Feeney, 442 U.S. 286 (1979).[2]

In its prior decisions, this Court has shown its unwillingness to permit sex-based statutory classifications for reasons such as administrative convenience, while still recognizing that men and women, although equals, are not always identical. In appropriate cases, statutory distinctions based on sex are justified and will withstand Constitutional scrutiny.

Of particular relevance to this case are the decisions of this Court which indicate that distinctions based on pregnancy do not constitute gender-based discrimination violative of the substantial relationship-important interest standard of review. Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

The Wisconsin statute currently under attack employs a gender-based classification which treats mother and putative father differently with respect to their parental rights to their unborn children. Wis. Stat. s. 48.415(6)(a)2 should survive constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment, under application of the Court's previously articulated intermediate standard of review for gender-based classifications, because the two groups of individuals are not in fact similarly situated, and

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[2] But see Reed v. Reed, supra p. 14; Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Craig v. Boren, supra p. 15; Califano v. Goldfarb, 430 U.S. 199 (1977); Duren v. Missouri, 439 U.S. 357 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 443 U.S. 76 (1979); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 152 (1980). In these cases, failure to meet the substantial relationship-important interest test resulted in invalidation of the statutes at issue.

because the statute is fairly and substantially related to the attainment of important state interests.

B. The Gender Based Classification Is Rational And Is Substantially Related To The Achievement Of Important Governmental Objectives.

In the present case, appellant challenges a Wisconsin statute because it treats two groups of individuals differently according to their gender. Gender is an immutable characteristic. "Nonetheless, gender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated. See, e.g. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (concurring opinion)." Caban v. Mohammed, supra p. 12, at 389 (Dissenting Opinion).

Appellee asks this Court to take judicial notice of the following facts:

(1) Biology dictates that the roles of men and women with respect to their unborn children are necessarily different, and that in relation to their unborn children, men and women are "not in fact similarly situated."

(2) When a woman carries her child to term and gives birth, she has necessarily been involved in a substantial relationship with that child, whether that relationship is positive or negative.

Appellee finds it little short of astonishing that such assertions have been challenged and now need supporting argument. Appellant, in his Jurisdictional Statement, brings to this Court's attention the relevant portion of Justice Shirley Abrahamson's dissent:

> Biology dictates only that a woman carry a child. It does not dictate that she show responsibility by

> providing proper care for herself (and thus the unborn child) or even that she love the child. The mother has control over prenatal care which, as the majority recognizes, is "important to the eventual health and well-being of an infant." ... A woman can disregard the care and protection of the child during pregnancy by ignoring the importance of proper nutrition, medical care and exercise, by smoking or ingesting dangerous drugs, by overuse of caffeine and alcohol, by gaining too much or too little weight, by exposing herself to hazardous environmental elements, or by subjecting herself to stress.
>
> Appendix A: Baby Girl K., supra p. 4, at 470-471 (Abrahamson dissenting Opinion).

Appellee does not deny the truth of the above assertions. Rather, appellee asserts that under such circumstances, where the mother fails to "provide proper care for herself," she nevertheless has a substantial relationship with her child; the relationship is simply a less positive one. Justice Abrahamson implicitly recognizes the impossibility of considering the unborn child separately from its mother; she expresses this opinion specifically, by adding the words "(and thus the unborn child)." The focus of her argument, in fact, is that whatever the mother does to herself, she also does to her unborn child.

As the unborn child develops, that child is a part of the mother. Not only do the mother's actions, physical health, and emotional state affect the fetus, but the development of the fetus affects the mother.[3] The mother goes through obvious physical and hormonal changes

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[3] D. Danforth, Obstetrics and Gynecology at 347 (1982). e.g.: "It is now evident that the constant interaction of fetus, placenta, and mother, rather than the autonomous action of the placenta, is responsible for the marked increased in steroid hormone production characteristic of pregnancy. Therefore, the fetal-placental-maternal unit, not the placenta alone, is the major source of steriod hormones during pregnancy." (Emphasis in original.)

during the period of development of her unborn child.[4] Whether or not she chooses to acknowledge these changes, and to aid them by "providing proper care for herself," she cannot stop them from occurring.

The mother is not only physically affected by the changes she undergoes during the development of her unborn child, but she is emotionally affected, if not by the mere knowledge that life is developing within her, then certainly by the production of and variation in the levels of hormones produced by her body. Her emotional state and consequent behavior are intimately and inextricably entwined with the hormonal balance in her body.[5]

Also relevant is the purpose for the mother's undergoing these changes in her physical and emotional states. Nature, of course, must provide for the wellbeing of the fetus. A woman cannot avoid the fact that, as long as the unborn infant is within her body, she will nurture

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[4] Danforth, id. p. 18.

Allison, Carrington, and Ledger, Obstetrics and Gynecology (1983).

[5] C. Cotman, & J. McGaugh, Behavioral Neuroscience 528-550 (1980).

"Specific hormones have a major role in regulating behavior." at 535.

"In general, hormones are involved in such processes as basic cellular metabolism, the development and differentiation of several organ systems including the brain, and in several behaviors such as maternal, sexual and agressive behavior." at 529.

"The peripheral hormones, and even the peptide hormones of the anterior pituitary, have actions on the brain which serve to regulate both behavior and subsequent hormone secretion." at 543.

it.[6] Thus, appellee disagrees with Justice Abrahamson's assertion that "[a] woman's support and care of an unborn child are voluntary." Appendix A: Baby Girl K., supra p. 13, at 47. (Abrahamson Dissenting Opinion).

The expectant mother also undergoes changes during her unborn child's development and birth in order to prepare her for the nurturing role which begins when the child is born. In fact, the mother-child relationship, known as "bonding" may begin to develop during the early months of pregnancy.[7] These profound physical and emotional interactions and interdependencies which exist between an expectant mother and her unborn child surely constitute "a significant relationship." Of course, after the child is born, the mother is free to resist her innate attraction

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[6] Danforth, supra p. 18 at 205. "During the course of pregnancy, the mother undergoes considerable physiologic adjustment in order to supply the fetus with necessary dietary ingredients while maintaining her own homeostatis."

Henly, Nutrition across the woman's life cycle: special emphasis on pregnancy NURS CLIN NORTH AM 99-110 at 105 (1982). "Several anatomic, physiological, and biochemical changes occur during a normal pregnancy. The purpose of these changes is to create an internal environment which is conducive to the healthy development of the fetus and to prepare the mother for labor, birth, and lactation. These changes in physiology form the basis for the nutrient requirements of the pregnant woman."

[7] Gay, A conceptual framework of bonding JOGN NURS 440-444 (1981).

Klaus & Kennell, Parent-Infant Bonding, at 65 (1982)." ... the process of attachment of mother to infant often begins before fetal movement."

to her infant, and is often successful in breaking the bond which exists between them. The process, however, is not an easy one, nor one that leaves the new mother unaffected.

This Court has recognized the uniqueness of the relationship between unborn child, or newborn infant, and mother:

> Both parents are equally responsible for the conception of the child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny. Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not.

Caban v. Mohammed, supra p. 12, at 404 (Dissenting Opinion). See also, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67-75 (1976).

> In short, it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems. ... But as a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process.

Caban v. Mohammed, supra p. 12, at 406-407 (Dissenting Opinion).

In Wisconsin, if a father fails to come forward and take affirmative action which establishes a significant relationship between him and his putative child, his parental rights may be terminated involuntarily under Wis. Stat. s. 48.415(6)(a)2. Because a mother necessarily has a substantial relationship with her unborn child, there can be no corresponding statutory provision terminating her rights based upon a lack of such a relationship. Wisconsin law does not ignore the nature of that

mother-child relationship, however. If, at birth, or at any time thereafter, it is apparent that a negative relationship exists between mother and child, a petition requesting that the child be found in need of protection or services ("CHIPS" petition) may be brought. The mother's parental rights may be terminated involuntarily as a result under Wis. Stat. s. 48.415(1),(2),(3),(4), or (5).

Thus, due to biological differences between men and women which render their relationship to their unborn children substantially different, appellee asserts that the gender-based differential treatment afforded mothers and fathers under Wis. Stat. s. 48.415(6)(a)2 is rationally based.

C. The Gender-Based Classification Is Substantially Related To The Achievement Of Important Governmental Objectives.

As stated in Baby K., supra p. 13, at 450, "[t]he purpose of s. 48.415(6)(a)2 is to promote the best interest of a child while insuring that the rights of a father who has established a substantial parental relationship with the child will not be terminated." This is an important, and indeed compelling, governmental objective. The statute facilitates the achievement of this oojective by permitting the termination of the rights of a putative father when he has never manifested his concern for the child or helped support it, and by subsequently permitting the child to be adopted into a family where he or she will be loved and cared for.

By permitting such involuntary termination of a putative father's parental rights, the statute also facilitates the important governmental objectives of encouraging marriage and encouraging the putative father to manifest his concern for his child by acts of affection

and contributions to the child's support. Any putative father with a genuine concern for his child will know that if he marries the child's mother, his parental rights will be protected. In a situation where marriage is contemplated, but perhaps the putative father is leery of actually entering into the formal legal relationship, the knowledge that doing so will protect his parental rights may provide the necessary incentive to marry.

Alternatively, if the putative father fails to marry the child's mother, he can still protect his parental rights. He can establish a relationship with the child by manifesting his concern for fetus or child and mother, and by providing financial assistance, if possible. In cases where the putative father is not otherwise motivated to do so, the knowledge, that by establishing this relationship he will be protecting his parental rights, may encourage the father actively to become involved in the care and support of his child, rather than to remain a passive background figure.

The statute also facilitates the adoption process by terminating the rights of an individual who has never cared for or supported his child, but who may nevertheless effectively block adoption by withholding his consent. In Wisconsin, before a child can be adopted, the consent of each parent is required, unless a parent's rights have been terminated. Wis. Stat. s. 48.91(2)(b). A putative father who has never established a relationship with his child can have his parental rights terminated involuntarily, pursuant to Wis. Stat. s. 48.415(6)(a)2, in order that the adoption proceedings may commence.

Because the gender-based classification in Wis. Stat. s. 48.415(6)(a)2 is rational and substantially related to

the achievement of important governmental interests, it does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Appellee, therefore, moves this Court summarily to affirm the Wisconsin Supreme Court's decision upholding the constitutionality of the statute.

VI. THE WISCONSIN STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the event this Court decides that appellant has properly raised the due process issues and that the Wisconsin Supreme Court has expressly ruled upon them, appellee moves the Court summarily to affirm the Wisconsin decision on the grounds that the statute does not offend the United States Constitution on due process grounds, because the Court explicitly did not limit its consideration of the putative father's conduct to the first five months of the mother's pregnancy, as alleged by appellant, and because no finding of parental unfitness is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution as a prerequisite to terminating parental rights when no relationship between parent and child has been established.

A. The Wisconsin Supreme Court Considered The Putative Father's Conduct Both Before and After The Child's Birth.

The Wisconsin Supreme Court states:

> Section 48.415(6)(a)2, Stats. allows the parental rights of a father whose paternity has been adjudicated to be terminated under certain conditions. The conditions exist where a father has not established a substantial relationship prior to the adjudication of paternity even though he had reason to believe he was the father of the child and had an opportunity to establish such a relationship. The question here is did B.B. have an opportunity to establish a relationship with Baby Girl K.

> In evaluating whether a substantial parental relationship exists, the legislature in s. 48.415(6)(a)2, Stats. authorized trial courts to consider the father's behavior during the pregnancy of the mother.
>
> Appendix A: Baby Girl K., supra p. 4, at 438. (Emphasis added.)

The court maintains that the statute "authorize[s]" trial courts to consider the father's behavior during the pregnancy of the mother. It does not, however, limit the lower court to this time frame, but rather permits an inquiry "[a]fter the child is born...[as to] whether a substantial relationship has been established with the child." Appendix A: Baby Girl K., supra p. 4, at 442.

This language indicates that the court did not limit its determination of whether the putative father had established a substantial relationship with his daughter to the first five months of the mother's pregnancy as appellant asserts; the court considered his actions from the time of conception until the adjudication of paternity, which in this case, was a full nine months after the child was born.[8]

Since the Wisconsin Supreme Court has determined that the statute mandates consideration of the putative father's actions and/or inaction both before and after the child's birth, and since this Court must accept the Wisconsin court's construction of its own statute, appellee moves the Court summarily to affirm the lower

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[8] Even if this were not so, and the Court limited its scrutiny to the first five months of pregnancy, the statute and United States Constitution mandate only that a putative father be given an opportunity to establish a substantial relationship with his child. As long as the father is aware of the pregnancy and of his paternity, as was B.B. in this case, he has this opportunity even though he has a limited period of time within which to exercise it.

court decision that the statute does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[9]

VII. THE STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE NO FINDING OF PARENTAL FITNESS IS REQUIRED WHEN NO PARENT-CHILD RELATIONSHIP HAS BEEN ESTABLISHED.

This Court has held that a finding of parental unfitness is not necessary in cases where an unwed father and his child have never been part of a family unit or when there has never been a substantial relationship formed between the putative father and child:

> we have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977). (Stewart, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of of legitimation, were in the 'best interests of the child.'

Quilloin v. Walcott, supra p. 13, at 255.

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[9] Appellee notes in passing that appellant makes much of the fact that the putative father was imprisoned during and following the mother's fifth month of pregnancy. Appellee moves this Court, if it considers the issue at all, to take judicial notice of the fact that, while an incarcerated putative father's ability to form a substantial relationship with his child is clearly restricted, the fact of his confinement does not preclude his establishing such a relationship.

In the present case, the unwed father has never even seen his child, much less had actual or legal custody of her. "Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child has never before lived." Id. at 225. Three days after Baby Girl K. was born, she was placed in a foster home. She has now resided there almost three years, and her foster parents, the only parents the child has ever known, wish to adopt her legally. Again, as in Quilloin, "the adoption in this case [would] give full recognition to a family unit already in existence, a result desired by all concerned, except appellant." Id. at 225.

The Wisconsin courts found, after a consideration of all the evidence presented to them, that the adoption would be in the best interest of Baby Girl K. See, Appendices A: Baby Girl K., supra p. 4, at 440-441, B at 4, and C at 2. In Quilloin, supra p. 14, at 225 where the putative father had had more contact with the child than appellant has had in the present case, this Court held that " ... the State was required ... to find [only] that the adoption, and denial of legitimation, were in the 'best interests of the child.'" This the Wisconsin courts have done. Appellee, accordingly, moves this Court summarily to affirm the decision below, because Wis. Stet. s. 48.415(6)(a)2 does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as the Due Process Clause does not require an explicit finding of unfitness when terminating a putative father's parental rights in a case where a substantial parent-child relationship has never existed.

CONCLUSION

This Court should dismiss the appeal as to the two due process questions presented, because these questions were never properly raised or decided at any lower court level as required by S.C.R. 16(1)(b). The equal protection question presented to this Court should be dismissed, because it does not raise a substantial federal question as required by S.C.R. 16(1)(b), and because the question has already been addressed and resolved by this Court.

Alternatively, this Court should summarily affirm the Wisconsin court decisions, because the statute in question does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The gender-based classification employed by the statute is rational and substantially related to important governmental objectives. Finally, the statute does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because it allows the putative father to establish a substantial relationship with his child both before and after birth, and because the Due Process Clause does not require an explicit finding of unfitness before terminating a parent's rights when no substantial relationship has ever existed between parent and child.

Respectfully submitted,

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the right to use compulsory process to obtain information which will lead to competent, relevant, material and exculpatory evidence. Information, such as the names of the reporters' sources, which might lead to exculpatory evidence would meet the requirements for compulsory process to issue. Because a journalist's privilege of nondisclosure is claimed, before a subpoena would be enforced the procedure set out herein would have to be followed.

In the present case, the defendant has not yet made a showing that there is a reasonable probability that the reporters' testimony will lead to competent, relevant, material and exculpatory evidence from witnesses apart from representatives of the state or witnesses at the John Doe. The trial judge apparently recognized this as well. He specifically found that:

"There is a high probability that the witness-sources at issue in this case are in some way connected to the John Doe investigation. This nexus exists because reason and logic compel the conclusion that the only sources which would have future information and knowledge about the prospective and active John Doe would have to come [from] within the John Doe hearing itself or from people who were peculiarly privy to the conduct of the John Doe."

[9]

The reporters testified that their articles contained everything substantive that their sources had revealed to them. The news articles involved in this case contain no suggestion that the unnamed sources have any knowledge whatsoever about the crime for which the defendant is charged. Rather, as Judge Greenwood recognized, they merely reflect a knowledge about the conduct of the John Doe proceeding. Therefore, the articles by themselves do not constitute a sufficient showing that there is a reasonable possibility the reporters' sources might lead to exculpatory evidence. In addition, nothing in the

testimony of the reporters at the hearing on the motion to quash the subpoenas suggested that any of their sources might be able to provide exculpatory evidence.

[10] Because the defendant Phillips has not made a showing, sufficient to require the denial of the reporters' motion to quash, the trial court erred in denying the motion and ordering *in camera* disclosure of the reporters' sources.

Since we determine that Phillips failed to make a *prima facie* case for the issuance of the subpoenas, the trial court's finding of contempt was not proper. We therefore reverse the contempt order entered by the court.

By the Court.—Decision of the trial court in Case No. 83–133–CR is reversed; decision of the court of appeals in Case No. 82–2244–W is reversed and cause remanded with directions for the trial court to quash the subpoenas.

IN the INTEREST OF BABY GIRL K., a person under the age of 18:

L.K., Petitioner-Respondent,

v.

B.B., Respondent-Appellant-Petitioner.

Supreme Court

No. 83–087. Argued April 27, 1983.—Decided July 1, 1983.

(Affirming 108 Wis. 2d 785, 324 N.W.2d 833 (Ct. App.).)

(Also reported in 335 N.W.2d 846.)

Parent and Child § 18*—parental rights—termination. Fact that father of child born out of wedlock had been incarcerated in prison system since fifth month of mother's pregnancy did not preclude termination of his parental rights (Stats § 48.415(6)(a)2).

* See Callaghan's Wisconsin Digest, same topic and section number.

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2. Parent and Child § 19*—parental rights—termination—conduct of father.
Trial court properly terminated father's parental rights of child born out of wedlock where father had asked mother to smuggle marijuana to him in prison, had physically assaulted mother while she was pregnant, had neglected to provide care or support to mother during pregnancy, had failed to present any evidence of attempts to contact child and had failed to contribute toward mother's medical expenses arising from pregnancy and delivery of child (Stats § 48.415(6)(a)2).

3. Parent and Child § 33*—parental rights—termination—specific finding of unfitness.
Due process does not require specific finding of parental unfitness in order to involuntarily terminate parental rights where father has failed to establish substantial parental relationship (Stats § 48.415(6)(a)2).

4. Appeal and Error § 243*—issue raised on appeal—constitutional question—discretion of court.
Consideration of constitutional issue raised for first time on appeal is discretionary with reviewing court and will be done if it is in best interest of justice to do so, if both parties have had opportunity to brief issue and if there are no factual issues that need resolution.

5. Parent and Child § 33*—parental rights—termination—equal protection.
Court's application of statutory provision allowing for termination of parental rights of father who had failed to develop substantial relationship with child born out of wedlock did not violate equal protection of law (Stats § 48.415(6)(a)2).
BEILFUSS, C.J., HEFFERNAN and ABRAHAMSON, JJ., dissent.
ABRAHAMSON and HEFFERNAN, JJ., dissent.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

For the petitioner there were briefs by *Gerhardt F. Getzin* and *Getzin & Janetta*, Wausau, and oral argument by *Gerhardt F. Getzin*.

For the petitioner-respondent there was a brief by *Patrick M. Brady* and *Bradley, Hoover & Brady, S.C.*, Wausau, and oral argument by *Patrick M. Brady*.

* See Callaghan's Wisconsin Digest, same topic and section number.

There was oral argument by *James Kurth*, Wausau, guardian ad litem.

DAY, J. This is a review of an unpublished decision of the court of appeals which affirmed a judgment of the Circuit Court for Marathon County, Leo D. Crooks, Judge, terminating the parental rights of the father, B.B., to Baby Girl K. under the provisions of sec. 48.415(6)(a)2 and 6(b),[1] Stats. 1981–82.

There are four issues presented on review. The first issue is: Does sec. 48.415(6)(a)2 permit termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the state prison system from the fifth month of the mother's pregnancy?

[1] Section 48.415(6)(a)2 and 6(b), Stats., 1981–82 reads:

"Grounds for involuntary termination of parental rights. At the fact-finding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following: . . .

"(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and:

. . .

"2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.

"(b) In this subsection, 'substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

The second issue is: Was the termination of B.B.'s parental rights under the provisions of sec. 48.415(6)(a)2, Stats., properly ordered here?

The third issue is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under sec. 48.415(6)(a)2, Stats.?

The final issue is: Does sec. 48.415(6), Stats., violate the Equal Protection Clause of the Fourteenth Amendment?

We conclude that the mere fact that the father of the child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude possible termination of his parental rights under sec. 48.415(6)(a)2, Stats. We also conclude that due process does not require a finding of parental unfitness where the father has failed to establish a substantial parental relationship under sec. 48.415(6)(a)2. We determine that the trial court properly terminated B.B.'s parental rights under sec. 48.415(6)(a)2.

Finally, we conclude that sec. 48.415(6)(b)2, Stats., does not violate the Equal Protection Clause of the Fourteenth Amendment.

Accordingly, we affirm the decision of the court of appeals.

L.K., Baby Girl K.'s mother, and B.B. began dating in July, 1979. At that time and up through to the birth of Baby Girl K. on March 17, 1981, L.K. was a minor.

In June, 1980, L.K. became pregnant with Baby Girl K. Approximately five months later, in November, 1980, B.B. was convicted of burglary and incarcerated at the Kettle Morraine Correctional Institute. A prior conviction occurred in 1977 when he was convicted of burglary and sent to the Wisconsin State Reformatory.

From June until November, 1980, B.B. continued seeing L.K. According to the testimony of L.K., B.B. did

not work but apparently supported himself quite well by dealing in drugs and "robbing places."[2] During that period of her pregnancy, L.K. stated that B.B. treated her "fairly good" but she recalled an incident where "he picked up my bike and threw it into the road from the porch, and then . . . grabbed me around the neck and tried to strangle me." L.K. also testified that B.B. would use the money from his drug dealing and robberies to "go out to bars and . . . buy drinks for everyone" and to buy marijuana. She noted that "he smoked a fair amount of his money away."

Prior to his incarceration, B.B. did not contribute to defraying the cost of any of L.K.'s pregnancy related expenses although he did pay some of her dental expenses.[3] After his incarceration, B.B. also made no contribution to her expenses. However, L.K. testified that she told him not to worry about the expenses while he was in prison. She also testified that B.B. suggested that she and the child go live with his mother after the baby was born.

While in prison, prior to the birth of Baby Girl K. B.B. and L.K. corresponded. In his letters, B.B. twice requested that L.K. come visit him and try to smuggle some marijuana to him. B.B.'s letters also expressed the concern if L.K. gave up the baby for adoption, that might end their relationship.[4]

[2] L.K.'s testimony as to these acts was admitted at trial not to prove the commission of the acts but for the purpose of showing that B.B. had funds to support L.K. during this period.

[3] L.K. testified on cross-examination that she asked B.B. prior to his incarceration for help in paying her expenses and in fact had her first doctor bill sent to his house. After the bill went unpaid, it was redirected to L.K.'s parents' house for payment.

[4] B.B.'s January 26, 1981, letter to L.K. (Exhibit 1 in the record) shows this concern: "I feel that if you do give our baby away that you'll be out fucking guys and you'll forget about me . . . I worry alot about guys going after your ass . . . ."

Before Baby Girl K.'s birth, B.B. apparently initially consented to having his parental rights terminated. However, as L.K. testified on cross-examination, he changed his mind "right around the time I stopped writing him." It was L.K.'s belief that B.B. wanted the child in order to perpetuate a relationship with her. The record and B.B.'s correspondence with L.K. lend credence to her statement.

B.B. points out that he offered to have L.K. and the child live with his mother and stepfather. L.K. refused that offer. A social worker's report which was ordered by the trial court following B.B.'s request for an evaluation of his parents' home showed that B.B. had been removed from that household and placed in a foster home and that later a half-sister had likewise been taken out of the household and placed in a foster home.[8]

On March 17, 1981, Baby Girl K. was born. L.K. signed a Voluntary Placement Agreement with the Marathon County Department of Social Services (Department) on March 18, 1981. The purpose of the agreement was to allow Baby Girl K. to be placed in a foster home upon her discharge from the hospital. The placement occurred on March 20, 1981. Baby Girl K. has remained in the same foster home since that date. The foster parents have expressed an interest in adopting her should the parents' rights be terminated.

[8] The report of the social worker from the Marathon County Department of Social Services dated November 19, 1981, and filed with the Court November 24, 1981, shows that B.B. was born June 14, 1963. He was one of three children born to his mother in her first marriage. His parents were divorced in January of 1961. The mother married J.H. later that year and two children were born to them. The social worker's report shows that the department provided social services periodically from the time of the breakup of the first marriage. In 1975 B.B. was placed "in substitute care" because of B.B.'s "disruptive behavior." When B.B. became eighteen the case was closed. A daughter from the second marriage was placed in "substitute care" in 1976. That case was apparently closed when the girl became eighteen in 1980.

L.K. initially filed a petition for voluntary termination of parental rights but withdrew it after learning that B.B. would not consent to having his parental rights terminated. B.B. had filed a Declaration of Parental Interest with the Department on April 13, 1981. In June, 1981, L.K. filed a petition requesting that Baby Girl K. be found in need of protection or services and that her custody be transferred to the Department for the purpose of continued foster care placement ("Chips" petition).

On August 3, 1981, B.B. filed a petition for a determination of paternity and custody, and a motion to consolidate these matters with the "Chips" proceeding. Subsequently, L.K. filed a petition for the termination of B.B.'s parental rights under sec. 48.415(6), Stats. All of these actions were consolidated.

On December 23, 1981, the trial court adjudged B.B. the father of Baby Girl K. The court then held a hearing on L.K.'s petition to terminate the parental rights of B.B. The testimony set out above was given at this hearing. In addition, at the hearing, Baby Girl K.'s guardian ad litem recommended that B.B.'s parental rights be terminated.

Following the hearing, in a decision from the bench, the trial judge ordered B.B.'s parental rights terminated. The court determined that B.B. had "failed to assume parental responsibility as set forth and defined in sec. 48.415(6)(a)2 and subsection (6)(b)," Stats. In so deciding, the court stated:

"This Court does find that preliminary to his incarceration Mr. [B.B.] was able to provide care and support and failed to do so. This record fails to show that Mr. [B.B.], in any way, attempted to carry on a meaningful relationship which this Court could consider as a substantial parental relationship, even by mail, or by phone, or in any other manner, doing those things that are essential to a substantial parental relationship: expressing concern with small gifts, a card, request that the baby be

brought down for a visit, any number of little things that spell the difference between the results of a sexual encounter or a parent-child relationship.

"This Court does believe that in spite of his incarceration Mr. [B.B.] had that opportunity to establish a substantial parental relationship. The legislature has not given us guidelines where they will decide or where they have decided, that 'X' number of weeks or months or years constitutes the failure to establish that parental relationship and it is true that Mr. [B.B.] did file the Declaration of Parental Interest as set forth in Exhibit 4. There is no doubt in my mind that he is interested. But, he has failed to carry through on those areas that are essential to establish a substantial parental relationship."

The trial court also made the following written findings of fact and conclusions of law which are pertinent:

"FINDINGS OF FACT

"7. That during the period that petitioner was pregnant with Baby Girl [K.], the respondent, [B.B.], on two occasions, wrote letters to petitioner asking her to smuggle marijuana into the Kettle Moraine Correctional Facility for his personal use.

"8. That on one occasion during the period that petitioner was pregnant with Baby Girl [K.] the respondent, [B.B.], physically assaulted petitioner.

"9. That the respondent, [B.B.], neglected to provide care or support to petitioner during her pregnancy even though respondent, [B.B.], had the opportunity and ability to do so.

"10. That respondent, [B.B.], failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl [K.] such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts.

11. That respondent, [B.B.], failed to make any attempt to contribute towards the medical expenses of petitioner occasioned by her pregnancy and the subsequent delivery of Baby Girl [K.].

"12. That there is a high degree of likelihood that Baby Girl [K.] will be adopted in the event the parental rights of [B.B.] are terminated.

"13. That Baby Girl [K.] is in good health and at the time of placement of foster care, was only three (3) days old.

"14. That the child has had no relationship with either parent or other family members so that it would not be harmful to said child to sever such relationships.

"15. That in the event the parental rights of [B.B.] are terminated, that the child will be able to enter into a more stable and permanent family relationship.

"CONCLUSIONS OF LAW . . .

"16. That respondent, [B.B.], has failed to assume parental responsibility for Baby Girl [K.] within the meaning of Sec. 48.415(6), Wis. Stats.

"17. That it is in the best interest of Baby Girl [K.] that the parental rights of her father, [B.B.], be terminated."

B.B. appealed from the judgment. The court of appeals affirmed. That court concluded that the evidence was sufficient to support a finding that B.B. had an opportunity to develop a substantial relationship with Baby Girl K. and had failed to do so. The court of appeals determined that the trial court's finding that the termination of B.B.'s parental rights would be in the best interest of Baby Girl K. was not against the great weight and clear preponderance of the evidence. The court also concluded that a specific finding of parental unfitness was unnecessary to terminate B.B.'s parental rights. However, the court went on to note that even though a finding of unfitness was not required, such a finding "is clearly sustained by the record." Finally, the court held that sec. 48.415(6)(a)2 did not unconstitutionally deny B.B. the equal protection of the law.

[1]

The first issue on review is: Does sec. 48.415(6)(a)2, Stats., permit the termination of the parental rights of a father of a child born out of wedlock where the father was incarcerated in the Wisconsin prison system from the fifth month of the mother's pregnancy?

Section 48.415(6)(a)2, Stats., allows the parental rights of a father whose paternity has been adjudicated to be terminated under certain conditions. The conditions exist where a father has not established a substantial parental relationship prior to the adjudication of paternity even though he had reason to believe he was the father of the child and had an opportunity to establish such a relationship. The question here is did B.B. have an opportunity to establish a relationship with Baby Girl K.

In evaluating whether a substantial parental relationship exists, the legislature in sec. 48.415(6)(a)2, Stats., authorized trial courts to consider the father's behavior during the pregnancy of the mother. Specifically, sec. 48.415(6)(a)2 allows a court to consider whether the father "has ever expressed concern for or interest in the support, care or well-being of the child or mother during her pregnancy and whether the person has neglected or refused to provide care and support even though the person had the opportunity to do so." It is clear therefore that the legislature intended that a father's pre-delivery behavior be a consideration in determining whether the father had established a substantial parental relationship.

May a father's action prior to the birth of his child form a sufficient basis to conclude that he had an "opportunity" to establish a substantial parental relationship with the child? We hold that it may.

In sec. 48.415(6)(b) the legislature defined "substantial parental relationship" as "the acceptance and

exercise of significant responsibility for the daily supervision, education, *protection and care* of the child." (Emphasis added.) Medical authorities have long recognized that prenatal care is important to the eventual health and well-being of an infant.[6] Because what happens to a fetus in utero can have a significant impact upon the quality of life a child will have after birth, we conclude that a parent's action prior to a child's birth can form a sufficient basis for determining whether that parent has established a substantial parental relationship with the child.

The parental rights of fathers of children born out of wedlock have been given constitutional protection. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). If the statute foreclosed the possibility of a father showing he had developed a substantial parental relationship with his child, due process would be violated. Here however, that possibility is not foreclosed. The father's parental rights must be continued absent a showing that he has failed to establish a substantial parental relationship.

The opportunity to exercise responsibility for the care and protection of a child begins before the child's birth. A statute such as this one which allows consideration of the father's conduct before the birth of the child recognizes that fact.

We conclude that the mere fact that the father of a child born out of wedlock has been incarcerated in the prison system since the fifth month of the mother's pregnancy does not preclude possible termination of his parental rights under sec. 48.415(6)(a)2, Stats.

[2]

Concluding that sec. 48.415(6)(a)2 allows a trial court to terminate the parental rights of a father in a situa-

[6] 4B C. Gray, *Attorneys' Textbook of Medicine*, secs. 305.10, 305.11 (3 ed. 1983); 5B *Lawyers' Medical Cyclopedia*, sec. 37.5a (C. Frankel ed. 1972).

tion like the one here, we now turn to the second issue before this Court on review: Was the trial court's decision terminating B.B.'s parental rights under the provisions of sec. 48.415(6)(a)2, Stats., proper? We conclude it was.

The trial court determined that B.B. had "failed to assume parental responsibility for Baby Girl [K.] within the meaning of sec. 48.415(b)." As the basis for this conclusion, the court in its findings of fact noted that: 1) B.B. had asked L.K. on two occasions to smuggle marijuana to him in prison, 2) had physically assaulted L.K. while she was pregnant, 3) B.B. had neglected to provide care or support to L.K. during the pregnancy even though he had the opportunity and ability to do so, 4) had failed to present any evidence of attempts on his part to contact the child, write to persons caring for her or to send cards or gifts, and 5) B.B. had failed to contribute toward L.K.'s medical expenses arising from the pregnancy and delivery of Baby Girl K.

A trial court's finding of fact will not be set aside unless against the great weight and clear preponderance of the evidence.[7] A review of the record here convinces us that the findings here were correct. Each finding is supported by clear and convincing evidence in the record.

L.K. established a *prima facie* case for the termination of B.B.'s parental rights under the statute. Because such a case had been established, the burden shifted and it became necessary for B.B. to present evidence that he had established a substantial parental relationship with Baby Girl K. This he completely failed to do. Although he attended the trial, he presented no testimony whatso-

[7] *Onalaska Electrical Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980); *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979); *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979); *Gehr v. Sheboygan*, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977); *Gerner v. Vasby*, 75 Wis. 2d 660, 662–664, 250 N.W.2d 319 (1977).

ever on his behalf and, with the exception of his Declaration of Parental Interest, no evidence on the termination question.

Based upon its findings of fact, the trial court concluded that B.B.'s parental rights should be terminated under sec. 48.415(6)(a)2. The trial court also concluded that the termination would be in the best interest of Baby Girl K.

In order for parental rights to be terminated, the petitioner must show by clear and convincing evidence that the termination is appropriate. This burden of proof is required both by sec. 48.31, Stats. 1981–82, and by the due process clause, *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 1402–1403 (1982).

We conclude that the petitioner here met this burden. The findings of fact as set out by the trial court provide clear and convincing evidence that B.B. had failed to establish a substantial parental relationship with Baby Girl K. and that termination of B.B.'s parental rights was in the child's best interest.

B.B. showed a blatant disregard for both mother and child when he asked L.K. to smuggle marijuana into prison for his use. If L.K. had acquiesed to his request and been apprehended, she would have faced the possibility of a prison term.[6] Further, B.B.'s physical assault of L.K. certainly shows no concern for the care or well-being of either mother or child. In addition, the testimony of the guardian ad litem supported termination.

The law is made to try and cope with the ever increasing number of illegitimate births and to alleviate the increasing burden to society that such households often present; ever growing relief rolls, and the bleak future the children face living at a near poverty level. It is for these reasons among others that when the single mother is willing to allow her child to be adopted

[6] Section 161.485(1), Stats. 1981–82.

whatever right such a child's father may have must be resolved in a manner that looks out for the child's best interest and at the same time protects the rights of the father. It is for this reason that examining his attitude and relationship to the unborn child and its mother makes common sense. Short of abortion, the pregnant mother can't escape responsibility. But the putative father's relationship is voluntary.

After the child is born his relationship to the child is also indicative of whether a substantial relationship has been established with the child. A court cannot ignore the circumstances of why this father was not physically available from the fifth month of pregnancy. He was convicted and sentenced for burglary. This was not a case of being absent because of illness, military service or the demands of a job. His absence was due to incarceration from the wilful act of burglary. It was his second incarceration for that crime.

B.B.'s parental rights were properly terminated under the provisions of sec. 48.415(6)(a)2, Stats.

[3]

The third issue on review is: Must a specific finding of parental unfitness be made in order to involuntarily terminate parental rights under sec. 48.415(6)(a)2, Stats.?

Even though sufficient findings have been made so that B.B.'s parental rights may be terminated under the statute, a question remains as to whether such a termination may be accomplished without a finding of unfitness.

In *Stanley*, the United States Supreme Court held that before the parental rights of an unwed father could be terminated that person was constitutionally entitled to a hearing on his fitness as a parent. 405 U.S. at 658. In *Santosky*, the Supreme Court noted that, "the fundamental liberty interest of natural parents in the care,

custody and management of their child does not evaporate simply because they have not been model parents," 455 U.S. at 753, and because of this interest held that termination could only take place where there was clear and convincing evidence it was appropriate. *Id.* at 769.

This court, in *In the Interest of J.L.W.*, 102 Wis. 2d 118, 306 N.W.2d 46 (1981), held that "the due process protections of both the state and federal constitutions prohibit the termination of natural parent's rights, unless the parent is unfit." In *J.L.W.*, because no finding was made that the natural mother was an unfit parent and because such a finding could not be sustained by the record, this Court reversed the order and judgment of the trial court terminating the natural mother's rights and returned the child to the mother.

Both *Stanley* and *J.L.W.* involved natural parents who had at some point in their children's lives participated in raising them. However commentators have suggested that the failure of a parent to participate at all in raising of the child may eliminate the constitutional requirements for a finding of unfitness.[9] We agree.

The recent United States Supreme Court case of *Lehr v. Robertson*, — U.S. — (Case No. 81–1756, decided June 27, 1983) supports this position.[10] In *Lehr*, the

[9] S. Hayes and M. Morse, *Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon*, 66 Mq. L. Rev. 439, 452, 475 (1983); See *Lehr v. Robertson*, — U.S. —, (Case No. 81–1756, decided June 27, 1983), Slip op. p. 13, footnote 17.

[10] Justice Stevens stated that the questions the United States Supreme Court had jurisdiction to consider on *review* were "whether the New York Statutes are unconstitutional because they inadequately protect the natural relationship between parent and child or because they draw an impermissible distinction between the rights of the mother and the rights of the father." *Lehr*, Slip op., p. 7, fn. 10.

On the latter issue, the father contended "that the gender-based classification in the statute, which denied him the right to con-

Court determined that the rights enjoyed by the natural fathers of children born out of wedlock did not acquire constitutional protection under the due process clause until "the unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child.'" Slip op., p. 12, quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979). The Court went on to add that "the mere existence of a biological link does not merit equivalent constitutional protection." Slip op., p. 12.

In *Lehr*, the United States Supreme Court determined that the father of a child born out of wedlock who had lived with the mother of the child up to the time of the child's birth and who had seen the child occasionally after the birth,[11] had no due process right to be notified

sent to [his daughter's] adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause." *Id.*

[11] According to Justice White in his dissent in *Lehr*, the fact that the father only occasionally saw the child after her birth was the direct result of the mother's attempts to conceal her whereabouts from the father. As Justice White states the facts:

"According to Lehr, [the father], he and Jessica's mother met in 1971 and began living together in 1974. The couple cohabited for approximately 2 years, until Jessica's birth in 1976. Throughout the pregnancy and after the birth, Lorraine [the mother] acknowledged to friends and relatives that Lehr was Jessica's father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father. (Footnote omitted.) Lehr visited Lorraine and Jessica in the hospital every day during Lorraine's confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August, 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August, 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine's location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August, 1978, Lorraine was already married to Mr. Robertson. Lehr as-

of the impending adoption of the child. Essential to this holding was a determination that the father, lacking a substantial parental relationship with the child, had no constitutionally protected interest in his relationship with the child which would be offended by his failure to be notified of the adoption proceedings.

The United States Supreme Court in *Lehr*, noting that there is a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility," quoted with approval a statement by Justice Stewart in *Caban:*

"Even if it be asumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. *Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" 441 U.S., at 397, (emphasis in original) slip op., pp. 10–11).

The United States Supreme Court then further said in the footnote following:

"In the balance of that paragraph Justice Stewart noted that the relationship between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if *'the actual relationship between father and child' is sufficient.*

serts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December, 1978, requesting that she permit Lehr to visit Jessica and threatening legal action on Lehr's behalf. On December 21, 1978, perhaps as a response to Lehr's threatened legal action, appellees commenced the adoption action at issue here." *Lehr*, (White, J., dissenting) slip op., pp. 2–3.

" 'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father. Cf. *Stanley v. Illinois*, *supra*. But here we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.' " *Lehr* fn. 16, slip op., pp. 11–13 quoting *Caban*, 441 U.S. at 397. (Stewart, J. dissenting.) (Emphasis added.)

Although in *J.L.W.*, this court suggested that due process might require a finding of unfitness before any natural parent's parental rights are terminated, the specific holding related only to a parent who had physical custody of the child for the first four months of the child's life and whose every action "from the time she learned of her pregnancy showed a concern for the child she was to bear." *J.L.W.*, 102 Wis. 2d at 137. Unlike Lehr, *J.L.W.* was a case where the parent had already "demonstrated a full commitment to the responsibilities of parenthood." *Lehr*, slip op., p. 12. Thus, this court's holding in *J.L.W.* does not require that a finding of parental unfitness be made where the father has failed to establish a parental relationship with the child.

In this case, the trial court found by clear and convincing evidence that B.B.'s parental rights should be terminated because he had the opportunity but failed to

establish a substantial parental relationship with Baby Girl K. We agreed with this determination. B.B.'s failure to establish a substantial parental relationship under the statute is the equivalent of a failure to "demonstrate a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of the child.'" *Lehr*, slip op., p. 12.

A natural father's interest in personal contact with his child is protected under the due process clause because of this society's belief in the protection of the familial relationship. *Lehr*, slip op., p. 12. The significance of this relationship " 'to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of *daily association*, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship.' " *Id.*, quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–233 (1972)) (emphasis added).

Here, although in prison, B.B. had the opportunity to establish a substantial parental relationship with Baby Girl K. Instead of offering care and support to the mother and child, he did the opposite and proceeded along a path which jeopardized not only his own future but that of the mother and child. Although B.B. did not have an opportunity for "daily association" with his child, that opportunity was lost because of his own doing. We cannot ignore this fact nor the fact that B.B. on at least one occasion attempted to strangle the mother of his child.

Where a father shows so little care, support or concern for the well-being of his child that his parental rights may be terminated under sec. 48.415(6)(a)2, that failure to establish a substantial parental relation-

ship with the child means that the father's interest in contact with his child does not warrant protection under the due process clause of the constitution. Due process does not require a finding of parental unfitness before a father's parental rights may be terminated under sec. 48.415(6)(a)2.

[4, 5]

The final issue on review is: Does sec. 48.415(6)(a)2, Stats., violate the equal protection clause?

This issue was raised for the first time on appeal. The court of appeals considered this question and concluded that this statute did not deny B.B. the equal protection of the law.

Consideration of a constitutional issue raised for the first time on appeal is discretionary with this court and will be done if "it is in the best interests of justice to do so, if both parties have had the opportunity to brief the issue and if there are no factual issues that need resolution." *Laufenberg v. Cosmetology Examining Bd.*, 87 Wis. 2d 175, 187, 274 N.W.2d 618 (1979); *State v. Yellow Freight System, Inc.*, 101 Wis. 2d 142, 158, 303 N.W.2d 824 (1981). In this case, these requirements are met. Further, the court of appeals had the opportunity to examine this issue and render an opinion on the question. We therefore will exercise our discretion to consider the issue.

Where a statute discriminates on its face between males and females, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Mississippi University for Women v. Hogan*, —— U.S. ——, slip op., p. 5 (July 1, 1982). For a statute which discriminates on the basis of gender to be upheld, there must be a showing that it "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achivement of those objectives.'" *Hogan*, slip op., pp. 5–6 quoting

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980). This test must be applied "free of fixed notions concerning the roles and abilities of males and females." *Hogan*, slip op., p. 6. However, where a statute draws a distinction between classes where all the members of one class possess a characteristic not possessed by all the members of the other class, the fact that the distinction is "gender-based" should not give rise to a presumption that the Equal Protection Clause has been violated. *Caban v. Mohammed*, 441 U.S. 380, 409–410 (1979) (Stevens, J., dissenting).

The majority in *Caban* held that a New York statute which gave the mother of children born out of wedlock, but not the father of such children, veto power over the adoption of the children violated the Equal Protection Clause of the Fourteenth Amendment. In *Caban*, the children involved were four and six years old at the time of the adoption proceeding. The father had lived with the mother and children as a "natural family" for several years prior to the proceeding. 441 U.S. at 389.

Although rejecting the contention that unwed fathers necessarily have less of a relationship with their children then do unwed mothers, the Court noted that where newborn infants were concerned, the differences between unwed mothers as a class and unwed fathers might form a basis for a valid gender-based distinction regarding adoption proceedings. 441 U.S. at 389.

In his dissent in *Caban*, Justice Stevens recognized this exception. He noted that from conception, "on through pregnancy and infancy, the differences between the male and female have an important impact on the child's destiny." 441 U.S. at 404. We agree. During pregnancy, the biological makeup of the mother insures that she will provide care and support for the child forming within her. She cannot help but accept and exercise significant responsibility for the protection and

care of the child because her own welfare is tied intimately to the child's.

The purpose of sec. 48.415(6)(a)2 is to promote the best interest of a child while insuring that the rights of a father who has established a substantial parental relationship with the child will not be terminated. Both the state and the unwed mother may have substantial interests in terminating the parental rights of a father who had no substantial relationship with the child. The statute gives fathers incentive to provide care and support for the mother and child during pregnancy and infancy. Further, it allows for a prompt determination of the status of the child so that, if desired, the child might be adopted into a family that wants a child.

The statute as applied in this case is not based upon fixed notions of what the "proper" roles of males and females should be. The United States Supreme Court in *Lehr* recognized that "the existence or non-existence of a substantial relationship is a relevant criterion in evaluating both the rights of the parents and the best interests of the child." Slip op., p. 18. The statute here is based upon a recognition that for women biology dictates that they provide care and support for a child during pregnancy. For men however, that care and support must be voluntarily given. Men may or may not accept and exercise significant responsibility for the care and protection of the child during pregnancy; women have it thrust upon them. For men, failure to establish a substantial parental relationship after a child is born is the equivalent of a married father abandoning or neglecting his child which can be the basis for a finding of unfitness. And, as the United States Supreme Court in *Lehr* noted, "if the father had not 'come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclude [] the State from withholding from him the privilege of vetoing the adop-

tion of that child.'" Slip op., p. 19. Here, while termination of parental rights rather than the availability of a veto over the child's adoption is at issue, the equal protection question is substantially the same.

The statute as applied here does not violate the Equal Protection Clause of the Fourteenth Amendment.

We agree with the trial court and the court of appeals that the record here amply supports termination of B.B.'s parental rights.[12]

By the Court.—Decision of the court of appeals is affirmed.

BEILFUSS, C.J. (*dissenting*). The majority affirms the trial court's termination of B.B.'s parental rights, holding that the statutory grounds for involuntary termination were met and that due process does not require a finding of parental unfitness before termination. Because the record before this court does not support the holding that the statutory grounds were met, and because I believe due process requires a finding of unfitness before B.B.'s rights can be terminated, I dissent.

The majority glosses over the nature of the interest at stake in an involuntary termination hearing. Therefore I must start with an examination of the nature of B.B.'s rights which must be accorded before termination. The relationship between parent and child is protected by the Due Process Clauses of the state and federal constitutions. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *In Interest of J.L.W.*, 102 Wis. 2d 118, 186, 306 N.W.2d 46 (1981). Both this court and the United States Su-

[12] The statement by Justice Abrahamson in footnote 1 of her dissent alleging that "the majority treats termination of parental rights like a punishment for a crime, thus increasing the legislatively prescribed penalties for commission of a crime by adding a new penalty, loss of a child" is an unwarranted conclusion and is simply incorrect.

Contrary to the language of the statute, the majority relies solely on B.B.'s actions during L.K.'s pregnancy to affirm the trial court's finding that the statutory grounds were met and ignores his conduct during the nine months between Baby Girl K.'s birth and the adjudication of paternity. Even assuming that B.B.'s conduct during L.K.'s pregnancy showed a complete disregard for the health and welfare of the unborn child and the mother (which the record does not support), there is evidence in the record that immediately after Baby Girl K.'s birth B.B. consistently demonstrated, through the legal process and correspondence with the trial court, foster parents and Marathon County Department of Social Services, his interest and concern for his daughter and his desire to raise her after his release from criminal confinement. The majority completely ignores the first nine months of Baby Girl K.'s life, and relies solely on the nine months of pregnancy. This is an erroneous and unconstitutional application of sec. 48.415(6)(a)2, Stats. Clearly B.B.'s conduct during Baby Girl K.'s life is at least equally important to the determination of whether he established a parental relationship with his daughter as the gestation period.

Rather, the correct application of the statute is to examine B.B.'s conduct from the time he learned of the pregnancy to the time he was adjudicated (here by his own motion) Baby Girl K.'s father. A review of the entire record in this light leads to the conclusion that the trial court's finding that B.B. failed to establish a substantial parental relationship was "clearly erroneous." Sec. 805.17(2), Stats.

The review of the record before the court is somewhat complicated by the fact that there is evidence in the record as a whole relating to the issue of establishment of a "substantial parental relationship" which was not presented at the termination hearing nor considered by the

trial judge. I began with an examination of the evidence presented at the termination hearing. There was undisputed evidence that the father did not contribute to the expenses of the pregnancy that arose before he was incarcerated, although he had the funds to do so. It is also undisputed that on one occasion B.B. physically assaulted L.K. while she was pregnant. Finally, it is undisputed that on two occasions B.B., in disregard of L.K.'s welfare, asked L.K. to smuggle marijuana into the prison. All this evidence militates toward a finding that B.B. was not concerned for the welfare of either the mother or baby.

However, other testimony of the mother shows that B.B. did have a concern for both her and Baby Girl K., both *during* and *after* the pregnancy. The evidence demonstrates that B.B. was "happy" when he learned of the pregnancy, intended to marry the mother, and spent "every day" with the mother until his incarceration. Her testimony established that during the pregnancy he did pay her dental expenses and that following his incarceration she wrote to B.B. telling him not to worry about the expenses of her pregnancy. Finally, the evidence introduced at the hearing indicates that following his incarceration B.B. repeatedly informed L.K., through letters and telephone conversations, that he was willing to provide for both the mother and the child by the placement in his mother's home until he was released.[2]

[2] The majority chooses one sentence from one letter to demonstrate that B.B. in his letters to L.K. showed that his only interest in the child was to perpetuate his relationship with L.K. (*Supra*, p. 433, n. 4). The majority fails to point out that in this same letter, along with the other letters contained in the record, B.B. on a number of occasions speaks of his concern for the mother and the child, both during and after pregnancy and his intent to provide for both of them. The record also contains a letter to the trial court from the chaplain of Kettle Moraine Correctional Institute in which he expresses his opinion that B.B. was genuinely inter-

B.B. presented evidence that made his interest in the child known by filing a Declaration of Parental Interest.

If this was the extent of the evidence in the record relating to whether B.B. had shown parental interest, it would be a much closer question whether the trial court's finding should be upheld based on the trial judge's ability to view the witnesses and assess credibility. However, there is other information in the record of the trial court as presented to the court which bears directly on the issue of B.B.'s attempts to assume parental responsibility for Baby Girl K. under the terms of sec. 48.415(6)(a)2, Stats.

There are references in the record to the fact that since the child's birth B.B. wrote to the foster parents, the trial judge and the Department which had legal custody of Baby Girl K., requesting photographs and information on the child's placement and welfare, and expressing his intent to have the child placed with his mother's family until he was released and could care for the child himself. The record demonstrates that on one occasion the trial judge explicitly rejected B.B.'s attempts to communicate with his daughter, stating that such action was premature until paternity was established. Further, when the record is looked at as a whole, it is clear that consistently since the child's birth the father had attempted through the legal process to demonstrate his interest in and concern for the child and his intent to provide for the child.[3] In light of B.B.'s

ested in his daughter and was not motivated by an intent to retain a relationship with the mother.

[3] B.B.'s attempts through the legal process to assert his interest in Baby Girl K. are as follows: Less than one month after her birth, B.B. filed a Declaration of Parental Interest; at an initial hearing on the "Chip's" petition filed by L.K., B.B.'s counsel informed the court that B.B. wanted the child placed with his mother until his release; in August of 1981, B.B. filed a petition for determination of paternity and custody and a motion for summary

limited opportunity and ability to personally provide care and support for Baby Girl K. following his incarceration (five months into the pregnancy) and the fundamental nature of the right at issue, I find the information in the record of B.B.'s attempts through the legal process and correspondence to assert his interest in his child to be especially important.

This information was in the record before the trial court when it made its determination that parental rights should be terminated, but the record demonstrates that the trial court did not consider this evidence. Rather, the trial court, in its findings of fact, explicitly found that B.B. "failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl K. such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts." The entire record before this court simply does not support this finding. The majority perpetuates the trial court's error by also ignoring this very relevant and important evidence.

On the basis of the entire record before this court and the trial court, I believe that the trial court's finding that the statutory grounds for involuntary termination were met to be unsupported by the record. However, because of the nature of the evidence in the record, I would remand the action for a new hearing on this issue rather than simply finding that the statutory grounds were not met. Some of the evidence of B.B.'s attempts to contact the child consists of references to letters which are not in the record and their actual content is unknown. Further, some of the evidence that is actually

judgment on the issue of paternity; at an initial hearing on the paternity petition and L.K.'s petition to terminate B.B.'s parental right, B.B.'s counsel asked the court to allow B.B. to communicate with his daughter through the Department of Social Services, which had legal custody of Baby Girl K.

contained in the record may not have been properly before the trial court. Finally, I believe that the trial court is in a better position to assess the credibility of such evidence and witnesses. This is especially important in this case because L.K. and the guardian *ad litem* state that B.B.'s concern for the child is motivated solely by his desire to effect a reconciliation with the mother. B.B. denies any such motivation and there is some evidence in the record showing that his interest is genuine, *see* n. 2, *supra*. This court is simply not in a position to make an informed decision on this issue which involves a credibility determination. For these reasons I believe this issue should be retried under authority granted to this court by sec. 751.06, Stats.

The majority also holds that due process does not require a finding that B.B. is an unfit parent before his parental rights can be terminated. I disagree. The majority relies on the recent United States Supreme Court decision in *Lehr v. Robertson*, — U.S. — (June 27, 1983), to support this position. I believe their reliance on the *Lehr* decision is misplaced.

First, the court in *Lehr* was addressing the limited issue of whether the New York statutory scheme adequately protected the putative father's opportunity to form a parental relationship with his child, such that he would then be entitled to notice of adoption proceedings. *Lehr*, — U.S. —, slip. op., p. 14. The New York statutory scheme under review in *Lehr* has absolutely no similarity to sec. 48.415(6)(a)2, Stats., and thus *Lehr* at best has only very limited applicability to the instant case.

Second I read *Lehr* to fall into the holding of *Quilloin v. Walcott*, 434 U.S. 246 (1978) as interpreted by this court in *In Interest of J.L.W.*, 102 Wis. 2d 118, 306 N.W.2d 46 (1981). In *J.L.W.* the court held that "except under unusual circumstances like those presented

in *Quilloin*, the due process protections of the state and federal constitutions prohibit the termination of a natural parent's rights, unless a parent is unfit." 102 Wis. 2d at 136. The unusual circumstances in *Quilloin* which allowed the court to terminate parental rights without a finding of unfitness are as follows: an unwed father attempted to block the adoption of his son by the natural mother and her husband when the child was eleven years old and had been in the mother's custody his entire life. The father never had custody and was not seeking custody but wanted to block the adoption which would terminate his parental rights. The Court rejected the father's argument that he was denied due process, stating:

"We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–863 (1977) (STEWART, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" 434 U.S. at 255.

Similarly, in *Lehr*, the putative father "never had any significant custodial, personal or financial relationship (with his child), and he did not sek to establish a legal tie until after she was two years old." *Lehr*, —— U.S. ——, slip op., p. 14. Also, as in *Quilloin*, the father was

attempting to block the adoption by the natural mother who had had custody since birth.

The facts in this case are clearly distinguishable from those in *Quilloin* and *Lehr*. This is not a situation as in *Quilloin* and *Lehr* where the natural parent displayed almost no interest in the child for its entire life although well aware of the fact of parenthood and able to provide and care for the child. Here B.B. has indicated interest and concern for the child since he learned of her conception and has since shortly after birth requested custody. Further, B.B. is not attempting to block the adoption of Baby Girl K. by the natural mother or into an established family unit as in *Quilloin* and *Lehr*. In this case the natural mother, three days after the birth, released custody of Baby Girl K. to the Marathon County Department of Social Services. Here there are no adoptive parents nor adoption proceedings pending. Nor could there be until B.B.'s parental rights are terminated. Thus we find that the narrow "unusual circumstances" exception recognized in *J.L.W.* does not apply and due process requires that B.B. be found unfit before his rights can be terminated. As discussed above, the record simply does not support the finding of the majority that B.B. failed to establish a substantial parental relationship. He is therefore entitled to a finding of unfitness before his parental rights can be terminated. *Stanley v. Illinois*, 405 U.S. 645 (1972).

Further, contrary to the holding of the court of appeals, this court can not find that B.B. is an unfit parent as a matter of law based on the record before this court. Initially, there is an insurmountable constitutional obstacle to the court making such a finding based on this record—the Due Process Clauses of the state and federal constitutions. It is beyond dispute that due process demands adequate notice and an opportunity to be heard when a person is threatened with termination of

a fundamental liberty interest. B.B. was never accorded this constitutionally mandated hearing and thus his parental rights can not be terminated by this court. The record clearly demonstrates that B.B. was never notified that the petitioner was attempting to prove he was an unfit parent. Further, the record shows that the issue was never litigated in the termination hearing, nor even considered by either the trial court or the petitioner. The issue before the trial court at this hearing, and all the evidence presented, was directed solely to the question of whether the statutory grounds for involuntary termination were met. Thus, on this basis alone, the majority's termination of B.B.'s parental rights unquestionably violates due process and should not be sustained.

Further, even without this constitutional impediment, the record is insufficient to support the court of appeals holding that as a matter of law B.B. is an unfit parent. The evidence required to support a finding of parental unfitness must be very substantial:

"The standards for a finding of unfitness in Wisconsin have long deferred, as much as possible, to parental rights. When unfitness *is* found, however, it must be based upon most substantial grounds. The standards for unfitness have long been stringent. To support a finding of unfitness,

" 'it must appear that the [parent] has "so conducted himself, or shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, *but essential to their safety or to their welfare*, in some very serious and important respect, that his rights should be treated as lost or suspended,—should be superseded or interfered with." [Emphasis added.]'

Lemmin v. Lorfeld, 107 Wis. 264, 266, 83 N.W. 359, 360 (1900). It is evident, then, that a finding of unfitness is a determination that further contact between parent and child will be seriously detrimental to the

child." *Termination of Parental Right to A.M.K.*, 105 Wis. 2d 91, 102, 312 N.W.2d 840 (Ct. App. 1981).

The record simply does not support a finding that as a matter of law it is essential for Baby Girl K.'s safety or welfare that B.B.'s parental rights be terminated.

The court of appeals, in holding that a finding of unfitness was "clearly sustained by the record," stated:

"The trial court found that prior to his incarceration, B.B. had funds available to provide care and support for L.K. but failed to do so. The court also considered the incident of physical violence by B.B. toward the mother during her pregnancy and the fact that he requested that she smuggle marijuana into the prison for him twice during her pregnancy. At the very least, B.B.'s conduct demonstrates a complete indifference to the welfare of the child. The court also found that although B.B. was interested in the child, he failed to carry through with actions that would establish a substantial parental relationship."

The court of appeal's reference to the failure of B.B. to support L.K. and establish a substantial parental relationship can not be considered by this court in determining unfitness because the trial court's finding that that statutory grounds were met was not supported by the record. Further, I conclude that evidence of one isolated physical assault on the mother and two requests for marijuana while in prison do not as a matter of law make B.B. an unfit parent by clear and convincing evidence.

The only other evidence in the record that goes to unfitness is the fact that B.B. is now incarcerated for a burglary conviction, has a criminal record, and according to L.K.'s testimony, B.B. "dealt in drugs" and "robbed places." While all this evidence clearly is relevant to the issue of fitness, there are no facts in the record detailing any of this evidence. All the record contains is the bare facts stated above. Without an examination into

the details of B.B.'s actions, a finding of unfitness is not supportable.

This court cannot, based on this inadequate record, make the far-reaching finding of unfitness which leads to the irrevocable termination of parental rights. As stated by this court in *Termination of Parental Rights to T.R.M.*, 100 Wis. 2d at 689: "An examination of a record seldom is adequate to make the necessary factual determinations that are a part of this type of controversy." I would also remand the action to the trial court to conduct a hearing on B.B.'s fitness as a parent.

I therefore dissent.

I am authorized to state that JUSTICES HEFFERNAN and ABRAHAMSON join in this dissent.

SHIRLEY S. ABRAHAMSON, J. *(dissenting)*. I join Chief Justice Beilfuss's dissenting opinion.[1] I write separately to add that I disagree with the majority's conclusion that sec. 48.415(6)(a)2, Stats. 1981–82, does not violate the equal protection clauses of the Wisconsin and the United States constitutions.

Everyone agrees that sec. 48.415(6)(a)2 treats unmarried parents differently according to their gender. Sec. 48.415(6)(a)2 establishes grounds for terminating the unwed father's parental rights, not the mother's. I conclude that the statute on its face and as applied

[1] I only add that the majority treats termination of parental rights like a punishment for a crime, thus increasing the legislatively prescribed penalties for commission of a crime by adding a new penalty, loss of a child. Slip op., pp. 12, 19. The purpose of termination should be to place children permanently in accordance with their best interests, not to punish a parent. I would hold that the penalty of termination of parental rights for the commission of a crime is *per se* cruel and unusual punishment in violation of the United States Constitution, amends. VIII, XIV and the Wisconsin Constitution, art I, sec. 6.

to the facts in this case unconstitutionally discriminates against men based on their gender.[2]

Both this court and the United States Supreme Court are struggling with the difficult issue of defining the constitutional rights of parents and children. Judges and lawyers, like the general public, are parents and are not insulated from the highly personal and sometimes emotionally charged nature of the issues presented in these cases.[3] In this case we are specifically concerned about the due process and equal protection rights of unwed parents. The Supreme Court first indicated its recognition that unwed fathers have constitutional rights just eleven years ago in *Stanley v. Illinois*, 405 U.S. 645 (1972). *Stanley* raised more questions than it answered, leaving at least four major legal issues unresolved: whether the constitutional rights of unwed fathers are based on concepts of procedural or substantive due process or both; whether all unwed fathers have constitutional rights or whether only unwed fathers who have expressed an undefined amount of interest in the child are to be accorded constitutional protection; whether

[2] Under this reasoning it is not necessary to reach any of the other issues presented in this case. A court can terminate parental rights involuntarily if one of the grounds for termination under sec. 48.415 is proved in a fact-finding hearing. Sec. 48.42(1)(c)2, Stats. 1981–82. *See also In the Interest of DLS*, 112 Wis. 2d 180, 186, 332 N.W.2d 293 (1983). Only after the court finds that a statutory ground for termination of parental rights exists does the court reach the question of whether the parent whose rights are to be terminated is unfit. In this case the statutory ground set forth in the petition and argued at trial was the father's failure to assume parental responsibility. Sec. 48.415(6)(a)2. If the statutory ground is void because it violates the constitutions of this state and of the United States, the trial court could not involuntarily terminate the father's parental rights in this case, regardless of whether he was unfit as a parent. See pp. 447, 448.

[3] I find some of the majority's sociological observations questionable, but because they are only tangentially relevant to the legal issues presented in this case I do not discuss them.

the constitutional rights of unwed fathers are different depending on the type of proceedings, for example, adoption and termination of parental rights as opposed to custody; and whether equal protection concerns are addressed to distinctions between married and unmarried parents or between male and female parents.

Since *Stanley*, the Supreme Court has had few occasions to examine the extent to which a natural father's biological relationship with his illegitimate child is accorded constitutional protection. *See Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), and, decided just four days ago, *Lehr v. Robertson*, —— U.S. —— (June 27, 1983).[4] Both *Quilloin* and *Lehr* appear to address the due-process issue as applied to a particular case; *Caban* addressed the gender discrimination issue.

State legislatures, too, have wrestled with the problem of striking a balance between according rights to parents and ensuring that terminations are handled quickly and efficiently so that adoptions can proceed. *See* secs. 48.40 *et seq.*, Stats. 1981–82. Recognizing these areas of law as troublesome and ill-defined, I turn to a consideration of one aspect of the statute's constitutionality.

Sec. 48.415(6)(a)2 provides that one of the grounds for termination of a father's parental rights shall be

[4] I question the majority's haste to conclude that *Lehr v. Robertson* makes superfluous any due process protections accorded by this state's statutes or constitution. The Supreme Court decided *Lehr v. Robertson* four days ago. This court has had only parts of two days to reflect on that case and the differences between the New York statutes involved in *Lehr* and the Wisconsin statutes. I would have preferred to give the parties and the state an opportunity to submit briefs on the possible impact of *Lehr* on the issues presented in this case to enable this court to give *Lehr* the considered reflection it deserves. Because the majority considers *Lehr*, I, too, reluctantly consider it.

the father's failure to assume parental responsibility. According to the statute, failure to assume parental responsibility may be established by showing the following:

(1) the child was born out of wedlock and is not legitimated or adopted (48.415(6)(a));

(2) paternity was not adjudicated prior to the petition for termination of parental rights (48.415(6)(a));

(3) the *father* did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child (48.415(6)(a)2).

Sec. 48.415(6)(b) defines the phrase "substantial parental relationship" as meaning the acceptance and exercise of significant responsibility for the daily supervision, education, protection, and care of the child. It sets forth the following factors which the court may consider in evaluating whether a substantial parental relationship is established: "whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

The issue is whether this gender-based distinction, allowing the termination of a father's, but not a mother's, parental rights based on failure to assume parental responsibility violates the equal protection guarantees of the federal or state constitution.

A gender-based distinction can satisfy the equal protection guarantees of the United States Constitution if the statute "at least . . . serves 'important governmental objectives and [is] . . . substantially related to

achievement of those objectives.' "[5] The party seeking to uphold the statute carries "the burden of showing an 'exceedingly persuasive justification' for the classification."[6] The constitutionality of any gender-based distinction must be examined "free of fixed notions concerning the roles and abilities of males and females," and free of "archaic and stereotypic notions" about the roles of men and women. *Mississippi University for Women v. Hogan*, — U.S. —, 50 L.W. 5068, 5070 (1982).

This test for determining whether a gender-based distinction is constitutional has been termed the "intermediate level" scrutiny test. I, of course, accept this test for federal constitutional purposes, but for Wisconsin state constitutional purposes, I continue to adhere to the view that because gender-based classifications are inherently suspect, the "strict scrutiny" test is more appropriate. *Marshfield Clinic v. Discher*, 105 Wis. 2d 506, note 8 at 524, 314 N.W.2d 326 (1982) (Abrahamson, J., dissenting). I continue to believe that any classification based on immutable personal characteristics is "suspect" and that gender is obviously an immutable personal characteristic. Gender is a "visible characteristic determined by causes not within the control of the individual. It bears no relation to ability to contribute to or participate in society." *Hewitt v. Saif*, 294 Or. 33, 653 P.2d 970, 977 (1982). I do not believe it is necessary to analyze this statute according to a strict scrutiny

[5] *Mississippi University for Women v. Hogan*, — U.S. —, 50 L.W. 5068, 5070 (1982), quoting from *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980). *See also Lehr v. Robertson*, — U.S. — slip op., pp. 17-18 (June 27, 1983); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979).

[6] *Mississippi University for Women v. Hogan*, — U.S. —, 50 L.W. 5068, 5070 (1982), quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979).

standard, however, because this statute can not withstand the lesser intermediate level of scrutiny.

I conclude that the statute on its face and as applied is unconstitutional under the state and federal constitutions because the means used to achieve the government's objectives are not "substantially related to the achievement of those objectives." I first consider whether the statute on its face is unconstitutional.

The statute is designed to achieve the important governmental objectives of promoting the best interests of the child, protecting the rights of interested third parties, and ensuring promptness in and finality of the termination of parental rights to facilitate the child's adoption. I agree that these objectives are legitimate and important. *Lehr v. Robertson*, —— U.S. ——, slip op., p. 18 (June 27, 1983); *In the Interest of DLS*, 112 Wis. 2d 180, 187, 332 N.W.2d 293 (1983). Like its interest in voluntary termination proceedings, the state also has an interest in involuntary termination proceedings to ensure that the termination of parental rights is just. *In the Interest of DLS*, 112 Wis. 2d 180, 185, 332 N.W.2d 293 (1983).

The statute can only be upheld, though, if the gender-based distinction in sec. 48.415(6)(a)2 "is structured reasonably to further these ends," *Caban v. Mohammed*, 441 U.S. 380, 391 (1979).

While I agree with the majority that the failure of a parent to develop a substantial parental relationship with the child is a proper ground for the involuntary termination of parental rights, *see Lehr v. Robertson*, —— U.S. ——, slip op., p. 12, that truth is not sufficient to enable the statute to withstand constitutional attack. The state must still answer the question of why the statutory criterion applies to male parents but not to female parents.

There appear to be three justifications for this gender-based distinction. First, it may be argued that the dis-

tinction is justified because one automatically knows the identity of the mother, but the father is neither known nor accessible. In this case, and in all cases in which sec. 48.415(6)(a)2 applies, that basis for distinguishing between an unwed mother and an unwed father is irrelevant because the substantial parental relationship criterion is applicable only after the putative father has been notified of the termination proceedings, has appeared, and his paternity has been adjudicated. The legislature has already provided a means to terminate the parental rights of a father who cannot be identified or found. Sec. 48.415(6)(a)1.

The second possible justification for the gender-based distinction concerns the differences between the parents during the child's gestation period. The majority justifies the gender-based statute on the basis of the biological distinction between men and women concerning a child's gestation, just as it relies primarily on the father's actions during pregnancy to affirm the trial court's findings that the evidence fulfilled the statutory termination grounds (see Bellfuss, C.J., dissenting, *supra*, p. 453). Because women can become pregnant and physically can carry children within their bodies, but men cannot, reasons the majority, the gender-based distinction is justified.

I do not dispute the fact that there are biological differences between men and women. But I do not agree that these biological differences are sufficient justifications for this gender-based statute. The United States Supreme Court has recently strenuously emphasized that a parent's "mere biological relationship" with a child is not accorded constitutional protection. *Lehr v. Robertson*, —— U.S. ——, slip op., pp. 11–12 (June 27, 1983). *"Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."* *Id.*, at ——, slip op., p. 11, quoting with approval from *Caban v. Mohammed*, *supra*, 441 U.S. at 397 (Stewart, J., dissenting), quoted

with approval in the majority opinion, supra, pp. 445, 446. In *Lehr*, the Court distinguished between "a mere biological relationship and an actual relationship of parental responsibility" created by the parent's role in the child's life. *Lehr* at —, slip op., p. 12, and p. 13, n. 17. The Court in *Lehr* considered only the role of a biological father, because only that issue was before it, but the same reasoning applies to a biological mother. This reasoning undermines the very premise of the majority's holding that the mere biological differences between the father and mother, that is, insemination versus pregnancy, justify a gender-based distinction as to grounds for termination of parental rights.

Even if the biological difference between man and woman can be considered as the basis for establishing different grounds for termination of the father's and mother's parental rights, the reasons based on biological differences pointed out by the majority as support for the gender-based distinction do not withstand scrutiny. According to the majority, a man, unlike a woman, has the choice whether to care for the unborn child by caring for the pregnant woman and should forfeit parental rights to the child if he does not fulfill his parental responsibility to the unborn child by taking care of the mother. The majority asserts that, as a matter of nature, "biology dictates that [the mother] provide care and support for a child during pregnancy [by taking care of herself]." *Supra*, p. 450. The mother, as the carrier of the child, cannot, says the majority, choose not to accept and exercise significant responsibility for the care and protection of the child during pregnancy. The majority asserts that the woman's only option other than to exercise responsibility is to abort the pregnancy. *Supra*, p 442. The majority is, I suggest, mistaken about a woman's role during pregnancy.

Biology dictates only that a woman carry a child. It does not dictate that she show responsibility by provid-

ing proper care for herself (and thus the unborn child) or even that she love the child. The mother has control over prenatal care which, as the majority recognizes, is "important to the eventual health and well-being of an infant." *Supra*, p. 439 and n. 6. A woman can disregard the care and protection of the child during pregnancy by ignoring the importance of proper nutrition, medical care, and exercise, by smoking or ingesting dangerous drugs, by overuse of caffeine and alcohol, by gaining too much or too little weight, by exposing herself to hazardous environmental elements, or by subjecting herself to stress. A woman's support and care of an unborn child are voluntary and important.[7]

The mother, who fails to take care of herself, as well as the father, who fails to take care of the pregnant woman, fails to fulfill parental responsibilities to the unborn child. If the failure to fulfill parental responsibilities to the unborn child is a ground for terminating the father's rights, the majority gives no reason why it should not be a ground for terminating the mother's rights. Since the mother's role during pregnancy is generally more important than the father's, according to the majority's reasoning, it would appear that there is even more justification to terminate the mother's parental rights for failing to assume responsibility to the unborn child than the father's.

The third possible justification to gender-based distinction concerns the differences between the parents after the birth of the child. Although the statute requires the court to look at the relationship of the unwed father to the child after the child's birth, the majority confines its

[7] *See* Castelle, *Getting Ready for Parenthood: A Manual for Expectant Mothers and Fathers*, pp. 45–50 (1967); Hess and Hunt, *Pickles and Ice Cream, The Complete Guide to Nutrition During Pregnancy* (1982) *passim*; NIOSH, *Guidelines on Pregnancy and Work* (1977) *passim*; Russell, *Eastman's Expectant Motherhood* 42–87 (6th ed., 1977); Verrilli and Musser, *While Waiting: A Prenatal Guidebook*, 25–46 (1982).

reasoning justifying the gender-based distinction to the gestation period or at most immediately following gestation, *supra*, p. 449, because even it appears to recognize that the biological differences between unwed fathers and mothers cannot justify different treatment as to their voluntary failure to assume responsibility for the child after the child's birth.

Recognizing this fact, the majority, relying on Justice Stevens's dissenting opinion in *Caban v. Mohammed*, 441 U.S. 380, 389 (1979), concludes that the differences between unwed mothers as a class and unwed fathers might form a basis for a valid gender-based distinction regarding adoption proceedings where newborn infants are concerned. (*Supra*, p. 449.) The *Caban* majority did not decide this issue, and the Court specifically concluded that even assuming a difference between the closeness of unwed mothers and unwed fathers to the child based on their relationship to the child during pregnancy and immediately afterward, this generalized difference would not constitutionally support a gender-based distinction for purposes of adoption, and it "would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Caban v. Mohammed*, *supra*, 441 U.S. at 388–89. *Caban*'s analysis of equal protection and gender-based adoption laws was not overruled in or modified by *Lehr*. Here the child is nine months old, and the majority's reasoning is inadequate.

Because none of the proposed justifications for the statute can withstand analysis, I conclude that the statute's gender-based distinctions are not substantially related to the governmental objectives and that the statute is unconstitutional on its face.

Even if this statute were held constitutional on its face, it is clearly unconstitutional as applied in this case. As Justice Stevens explained in *Lehr v. Robertson*, —— U.S. ——, slip op., at p. 19 (June 27, 1983), a statute granting different rights to a mother and father regard-

ing termination of their parental rights may not constitutionally be applied in those cases where the mother and father are *in fact* similarly situated with regard to their relationship with the child. The majority has generalized that the mother is naturally closer to her child and has the natural obligation to raise the child. In this case, though, the mother's relation to the child during pregnancy was not explored, but we do know that the mother voluntarily decided not to raise the child, placing the child outside her home within three days after its birth, for reasons that may very well stem from her love for the child and her desire to allow it to be adopted. The trial court found as a fact that the "child had no relationship with *either* parent. . . ." (emphasis added; *supra*, p. 437). Accepting this finding of the circuit court, I must conclude that the mother and father in this case are similarly situated as to the child. Nonetheless, the statute treats the two parents differently, for no apparent reason. If this mother refused to terminate her parental rights voluntarily, involuntary termination proceedings could not be instituted against her on the ground that she failed to establish a substantial parental relationship with the child because the statute does not apply to the unwed mother. When one takes into consideration the father's actual efforts to establish a relationship with the child by initiating paternity proceedings one month after the child's birth and his expressing constant interest in the child, it is ironic that he, but not the mother, can have parental rights involuntarily terminated on this ground and without a finding of unfitness. According to *Lehr*, this statute is unconstitutional as applied in this case.

I conclude that the statute systematically harms men by assuming that even those unwed fathers who come forth after a child's birth, assert and adjudicate their paternity, and make reasonable efforts under the circumstances of the case to maintain parental ties with their children are to be treated differently from the bio-

logical mother regardless of her parental relationship with this child. This type of systematic harm to men can only "be explained . . . as the product of habit, rather than analysis or reflection," and cannot withstand constitutional scrutiny. *Lehr v. Robertson*, —— U.S. —— (slip op., p. 17, n. 24, June 27, 1983). Sec. 48.415(6)(a)2 subjects men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Lehr v. Robertson*, —— U.S. —— (slip op., pp. 17–18, June 27, 1983). Accordingly, I would hold that this statute violates the equal protection clauses of the United States and the Wisconsin Constitutions. I dissent.

I am authorized to state that, JUSTICE NATHAN S. HEFFERNAN joins in this dissent.

Daniel J. FOLEY, and Zita A. Foley, his wife, Plaintiffs and Joint Appellants-Petitioners,

v.

CITY OF WEST ALLIS, a municipal corporation, Defendant-Respondent,

Thomas C. KOWALSKI and American Family Mutual Insurance Company, Defendants and Third-Party Plaintiffs-Respondents,

ALLSTATE INSURANCE COMPANY, Third-Party Defendant-Respondent.

Supreme Court

No. 81-1747. Argued June 1, 1983.—Decided July 1, 1983.

(Reversing and remanding 109 Wis. 2d 685, 325 N.W.2d 737 (Ct. App.).)

(Also reported in 335 N.W.2d 834.)

1. Automobiles and Other Motor Vehicles § 611*—personal injury—failure to wear seat belts—reduction of damages.
Where negligence consisting of failure to wear available seat belt is not cause of collision but does contribute to party's injury, such negligence should not be used to determine injured party's contributory negligence, but should be used to reduce amount of damages recoverable.

2. Automobiles and Other Motor Vehicles § 168*—duties of occupant—seat belts.
Automobile occupant has duty based on common law standard of ordinary care to use available seat belts.

3. Automobiles and Other Motor Vehicles § 297*—contributory negligence—failure to use seat belts.
While failure to use available seat belts may constitute negligence in automobile collision, it cannot be labeled as passive negligence, since seat-belt defense doctrine rests on considerations different from those involved in passive negligence in that failure to wear seat belts generally causes incremental injuries, but in usual case of passive negligence passenger could have prevented injury completely by taking certain action.

* See Callaghan's Wisconsin Digest, same topic and section number.

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND RELEASED

AUG 17 1982

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 82-087

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

In the Interest of Baby Girl K,
a person under the age of 18:

L.K.,

Petitioner-Respondent,

v.

B.B.,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Marathon county: LEO D. CROOKS, Judge. Affirmed.

FOLEY, P.J. B.B. appeals a judgment terminating his parental rights to Baby Girl K. His petition to bypass this court, sec. 808.05, Stats., and his motion for a three-judge panel, sec. 809.41, Stats., were denied. Because this court concludes that sec. 48.415(6)(a)2, Stats., does not violate B.B.'s right to equal protection and because the trial court findings supporting termination are not against the great weight

and clear preponderance of the evidence, the judgment is affirmed.

FACTS

Baby Girl K. was born out of wedlock to L.K. on March 17, 1981. B.B., the father of the child, was incarcerated in November, 1980, about five months into L.K.'s pregnancy. The child was placed in a foster home immediately after birth. B.B. filed a petition for determination of paternity, and L.K. filed a petition for the involuntary termination of B.B.'s parental rights. The court found that B.B. was the father of the child and terminated his parental rights.

At the hearing on the petition for termination, L.K. testified that the child had not been legitimated or adopted and that B.B. knew and publicly acknowledged paternity. She testified that during the period of her pregnancy between June and November, 1980, B.B. spent "every day" with her, but did not aid her in any way. She further testified that during her pregnancy, he once tried to strangle her and twice asked her to smuggle marijuana into prison for him. At the time of these incidents, L.K. was a minor.

CONSTITUTIONALITY OF STATUTE

B.B. claims that the gender-based classification in sec. 48.415(6)(a)2 denies him equal protection of the law and is therefore unconstitutional. Section 48.415(6)(a)2 provides that an unwed father who fails to develop a substantial relationship with his child is subject to an involuntary termination of his parental rights. There is no corresponding provision for the unwed mother of the child.

This court concludes that the application of sec. 48.415(6)(a)2 to B.B. does not unconstitutionally deny him equal protection of the law. The burden was on B.B. to prove that the sec. 48.415(6)(a)2 classification was unreasonable. See State v. Mertes, 60 Wis.2d 414, 416-17, 210 N.W.2d 741, 743 (1973). A court will uphold the classification when it is substantially related to achieving an important governmental objective. State v. Hill, 91 Wis.2d 446, 451, 283 N.W.2d 451, 453 (Ct. App. 1979).

The gender-based classification in sec. 48.415(6)(a)2 is reasonable, and the statute does achieve the important governmental objective of promoting the best interests of the child. It is reasonable to treat fathers differently from mothers because a father's relationship with a child is

necessarily different from a mother's relationship, both before and after a child's birth. A father does not get pregnant. Fatherhood must therefore be established while motherhood cannot be questioned. Until paternity is adjudicated, a father cannot be made to support his child. Conversely, a mother has no choice but to support her child, regardless of any court adjudication of her maternity. Additionally, during the pregnancy, a mother must always have a substantial relationship with her child.

The objective of sec. 48.415(6)(a)2 is to promote the best interests of the child. See sec. 48.01(2), Stats. This is an important governmental objective. Clearly, it is in a child's best interests to have a father who is concerned with and interested in the child's well-being, care, and support. By requiring a father to show this concern and interest to avoid termination of his parental rights, the statute promotes the best interests of the child.

SUFFICIENCY OF EVIDENCE

The trial court finding that termination of B.B.'s parental rights would be in the best interests of Baby Girl K is not against the great weight and clear preponderance of the evidence and therefore will not be upset on appeal. See G.G.D. v. State, 97 Wis.2d 1, 12, 292 N.W.2d 853, 858 (1980). On the

contrary, the finding is supported by the overwhelming weight of the evidence. The child had no relationships with B.B. or other family members, and termination of B.B.'s parental rights would certainly not be harmful to the child. The child has been in foster care since birth and has never known her biological parents. Additionally, if B.B.'s parental rights are terminated, the child can enter immediately into a family relationship with more stability. B.B., conversely, could not personally care for the child until his release from prison. His suggestion that the child be placed with his parents until his release was justifiably not acceptable to the court.

This court also concludes that the evidence was sufficient to support a finding that B.B. had an opportunity to develop a substantial relationship with Baby Girl K. Before termination is authorized by sec. 48.415(6)(a)2, the parent whose rights are being terminated must have had such opportunity B.B. claims that his imprisonment denied him the opportunity to develop a substantial relationship.

Although it was more difficult for B.B. to develop a parental relationship with his child because he was in prison, it was not impossible. As noted by the court, there was no evidence of attempts to send cards or gifts to the child. B.B. also had the opportunity to exercise significant responsibility

for the child before his imprisonment. He could have assumed at least some responsibility for the support, care, and comfort of the mother. The trial court properly considered this period of time in determining whether such a relationship has been developed. Section 48.415(6)(b) specifically provides that the court may consider the period of the pregnancy, and with good reason. This is an important period for both the child and the mother. The putative father's efforts and interest during the pregnancy may also bear significantly on his sincerity in later opposing the termination of his parental rights and on his concern for his child.

NECESSITY OF FINDING OF UNFITNESS

This court concludes that a specific finding that B.B. was an unfit parent was not necessary to terminate his parental rights. When termination of parental rights is so clearly in a child's best interests, this court should attempt to uphold the termination. Nevertheless, B.B. argues that the court must make a finding that he is an unfit parent before it may terminate his parental rights. B.B. relies on Quilloin v. Walcott, 434 U.S. 246 (1978), and Interest of J.L.W., 102 Wis.2d 118, 306 N.W.2d 46 (1981).

J.L.W. does not control the dispostion of this appeal. In J.L.W., the court held that a finding of unfitness had to be made before the court could terminate a mother's parental rights. This holding was carefully limited to the specific facts presented in the case. Id. at 135, 306 N.W.2d at 54. The facts in J.L.W. and in this case differ substantially. The mother in J.L.W. had legal custody of the child, and she also had physical custody of the child for the first four months of the child's life. B.B. has never had either legal or physical custody of Baby Girl K. In J.L.W., no finding of the mother's unfitness as a parent was made, nor could such a finding be sustained on the record. Although a finding that B.B. was an unfit parent was not made, such a finding is clearly sustained by the record.

The trial court found that prior to his incarceration, B.B. had funds available to provide care and support for L.K. but failed to do so. The court also considered the incident of physical violence by B.B. toward the mother during her pregnancy and the fact that he requested that she smuggle marijuana into the prison for him twice during her pregnancy. At the very least, B.B.'s conduct demonstrates a complete indifference to the welfare of the child. The court also found that although B.B. was interested in the child, he

failed to carry through with actions that would establish a substantial parental relationship.

Additionally, J.L.W. recognized that there were circumstances such as those in Quilloin in which due process did not preclude a termination without a finding that the parent was unfit. There are similar circumstances present in this case. B.B. has never been a member of his child's family and, in fact, has never seen the child. He also has never had custody of the child. Additionally, he is presently incarcerated and he has a criminal record. Individually, these circumstances would not necessarily support a termination without a finding of unfitness. When all the circumstances are combined, however, and balanced against the persuasive evidence of the child's best interests, they are sufficient to permit the termination of B.B.'s parental rights.

By the Court.--Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN | CIRCUIT COURT CHILDRENS DIVISION, BR. II | MARATHON COUNTY

In the interest of:

BABY GIRL KRUEGER,
a person under the age of 18.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT - TERMINATION OF PARENTAL RIGHTS

CASE No. 81-JU-391B

FACT FINDING HEARING:

PRESIDING JUDGE: Leo D. Crooks
Place: Marathon County Circuit Court Branch III
Wausau, WI 54401

Date: December 23, 1981

Appearances: Petitioner, Lisa Marie Krueger
Petitioner's attorney, Patrick M. Brady
Respondent, Bryon Buhse
Respondent's attorney, Gerhardt F. Getzin
Guardian ad litem, Attorney James Kurth
Attorney for Marathon County Department of Social Services, Weldon Nelson

I, the Judge, before whom this matter was tried, do hereby make the findings of fact, conclusions of law and judgment:

FINDINGS OF FACT

1. The petitioner in this action is Lisa Marie Krueger, mother of Baby Girl Krueger, who resides at 705 East Lakeshore Drive, Wausau, Wisconsin 54401.

2. The respondent, Bryon Buhse, resides at Kettle Morraine Correctional Facility, P. O. Box 51, Plymouth, Wisconsin 53703.

3. The petitioner, Lisa Marie Krueger, and respondent, Bryon Buhse, are the natural parents of Baby Girl Krueger, born March 17, 1981. That said child was born out of wedlock, has not been subsequently legitimated or adopted.

4. That at the time of filing of the petition herein, paternity of Baby Girl Krueger had not been adjudicated but that the paternity of Bryon Buhse with respect to Baby Girl Krueger was adjudicated prior to the commencement of the hearing in this matter.

5. That all persons who were proper parties to this action were personally served with the summons and petition herein, received proper notice of all hearing dates and were given the opportunity to appear and testify in person.

6. That Baby Girl Krueger has resided in foster care at 306 Prospect Avenue, Wausau, Wisconsin 54401 since leaving the hospital at the time of her birth.

7. That during the period that petitioner was pregnant with Baby Girl Krueger, the respondent, Bryon Buhse, on two occasions wrote letters to petitioner asking her to smuggle marijuana into the Kettle Morraine Correctional Facility for his personal use.

8. That on one occasion during the period that petitioner was pregnant with Baby Girl Krueger the respondent, Bryon Buhse, physically assaulted petitioner.

9. That the respondent, Bryon Buhse, neglected to provide care or support to petitioner during her pregnancy even though respondent, Bryon Buhse, had the opportunity and ability to do so.

10. That respondent, Bryon Buhse, failed to present evidence of any attempts on his part to establish a parental relationship with Baby Girl Krueger such as attempts to contact said child, write to persons caring for said child or to send the child cards or gifts.

11. That respondent, Bryon Bushe, failed to make any attempt to contribute towards the medical expenses of petitioner occasioned by her pregnancy and the subsequent delivery of Baby Girl Krueger.

12. That there is a high degree of likelihood that Baby Girl Krueger will be adopted in the event the parental rights of Bryon Buhse are terminated.

13. That Baby Girl Krueger is in good health and at the time of placement of foster care, was only three (3) days old.

14. That the child has had no relationship with either parent or other family members so that it would not be harmful to said child to sever such relationships.

15. That in the event the parental rights of Bryon Buhse are terminated, that the child will be able to enter into a more stable and permanent family relationship.

CONCLUSIONS OF LAW AND JUDGMENT

16. That respondent, Bryon Buhse, has failed to assume parental responsiblity for Baby Girl Krueger within the meaning of Sec. 48.415 (6), Wis. Stats.

17. That it is in the best interest of Baby Girl Krueger that the parental rights of her father, Bryon Buhse, be terminated.

18. The parental rights of Bryon Buhse to his minor child, Baby Girl Krueger, d/o/b March 17, 1980, are permanently terminated as of the date of this judgment pursuant to Sec. 48.427, Wis. Stats.

JUDGMENT IS HEREBY RENDERED AND THE CLERK IS ORDERED TO ENTER THIS JUDGMENT.

Dated this 22nd day of December, 1981 but effective December 23,1981.

BY THE COURT:

/s/
LEO D. CROOKS, Circuit Judge

Approved, December 21st, 1981

/s/
Patrick M. Brady, Attorney for Petitioner

Approved December 22nd, 1981

/s/
James Kurth, Guardian ad Litem

Patrick Brady Law Office
215 Grand Avenue
Wausau, WI 54401
Telephone: (715) 842-9822

APPENDIX D

James Kurth
ATTORNEY AT LAW

128 Grand Avenue
P.O. Box 1547
Wausau, WI 54401
(715) 845-2174

March 11, 1983

Marilyn L. Graves
Clerk of Supreme Court
State of Wisconsin
215 Monona Avenue
Madison, WI 53703

Re: In the Interest of Baby Girl K,
a person under the age of 18:

Lisa Krueger, Petitioner-Respondent
vs. Bryon Buhse, Respondent-Appellant-Petitioner.
Case No. 82-087

Dear Ms. Graves:

I appear in this matter as guardian ad litem for Baby Girl Krueger. I served in this capacity in the court below and, by this letter, I wish to advise the Supreme Court of my position in this matter as guardian ad litem. I ask that this letter be submitted to the Court with the briefs when this case is submitted for consideration.

I might parenthetically note that the Court has ruled that a guardian ad litem's rights, powers, and obligations continue when a case is appealed. A guardian ad litem is required to communicate his position to the Supreme Court and such communication may be done by letter. Marotz v. Marotz, 80 Wis2d 477, 259 NW2d 524 (1977).

Within days of the writing of this letter, Baby Girl Krueger will be two years old. For all intents and purposes, she has spent her entire life in the home of two well-qualified foster parents who wish to adopt her. At the time of her birth, her mother was a minor and her father, an adult, was incarcerated in the state prison system. Following the birth of Baby Girl Krueger, her mother indicated a willingness to take the necessary steps to have the child adopted. However, she will not terminate her parental rights to facilitate an adoption unless and until the father terminates his rights as well. The concern she has expressed during this proceeding has consistently been couched in terms of what is best for the child.

It was my recommendation to the court below, and it remains my

recommendation that the best interests of Baby Girl Krueger requirs termination of Bryon Buhse's parental rights. This recommendation was made after lengthy investigation and consideration of both legal and equitable factors.

Counsel for Mr. Buhse has put forth essentially two arguments in support of his position. Initially, he argues that a finding of unfitness was required before termination of Mr. Buhse's parental rights could be ordered. I believe such argument to be unpersuasive for several reasons. First, it appears that the facts of the individual case play a major role in deciding whether a finding of unfitness is necessary. In the Interest of J.L.W., 102 Wis2d 118, 135, 306 NW2d 46 (1981). The Court in that case ruled that, "under the facts presented", a finding of unfitness of the mother had to made before her parental rights could be terminated. Implicit in this holding is the idea that under other facts such a finding would not be necessary. Thus, as the Court held in that case, under unusual circumstances a finding of unfitness is unnecessary. It is respectfully submitted that under these circumstances, including the undisputed abuse of Baby Girl Krueger's mother, Lisa Krueger, during her pregnancy by Mr. Buhse, the attempts by Mr. Buhse to induce Lisa Krueger to commit criminal acts on his behalf during the later stages of her pregnancy, and his failure to make even superficial efforts to establish some sort of relationship with the child, the exception set forth in In the Interest of J.L.W., Supra, has been satisfied.

Significantly, the doctrine of the best interests of the child is the touchstone which must guide the disposition of a case such as this. That doctrine can and should prevail in this case. LaChapell v. Mawhinney, 66 Wis2d 679, 225 NW2d 501 (1975). In this case, the best interests of the child require termination. If the standard set forth in Section 48.426(3), Stats., is applied, there is not one aspect of such standard which militates against terminating Mr. Buhse's parental rights and several parts which strongly favor termination of his rights.

The second major point which is raised on behalf of Mr. Buhse is the constitutional question regarding Section 48.415(6)2, Stats. This issue has only been in this case on appeal. It has been presented as an afterthought and should not be entertained at this stage of the proceedings.

Ultimately, this matter becomes a question of the way in which the facts presented to the court below fit within the law. As guardian ad litem, I considered both the legal and factual questions to the best of my abilities. I believe that the lower

court's decision can, and should, be sustained based on the reasoning set forth in the brief submitted on behalf of Lisa Krueger. Beyond that, taking the best interests of Baby Girl Krueger into account, I remain struck by the total absence of facts which would support Brian Buhse's professed interest in her. The facts adduced at the hearing in this matter consistently showed a lack of concern for the baby, and a number of specific occasions of reckless disregard for the well-being of the baby's mother. Additionally, Mr. Buhse had the opportunity to refute those allegations or demonstrate some of his alleged concern. This could have been done through the testimony of friends or relatives, even if he chose not to testify himself. In spite of this, there was a complete void of any evidence which would support his position. In view of the facts which were presented and all of the circumstances, I believe it is entirely permissible to infer that Mr. Buhse is motivated in this matter by the prospect of personal gain through manipulation of the system and the child's mother.

It is, therefore, respectfully submitted that the best interests of Baby Girl Krueger require that the parental rights of Brian Buhse be terminated so that she can be adopted into the family with which she has been living her entire life.

Thank you.

Sincerely yours,

JAMES KURTH

JK/ss

No. 83-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE INTEREST OF BABY GIRL K,
A PERSON UNDER THE AGE OF 18;

BRYON BUHSE, Appellant,

v.

LISA KRUEGER, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO AFFIRM

JAMES KURTH
Guardian ad Litem for Baby Girl K
128 Grand Avenue
P.O. Box 1547
Wausau, WI 54401
(715)845-2174

MOTION TO AFFIRM

James Kurth, duly appointed Guardian ad Litem for Baby Girl K, respectfully moves this Court for an Order affirming the decision of the Wisconsin Supreme Court which was previously rendered in this matter.

As grounds for and in support of this Motion, it is respectfully shown that a response to the jurisdictional statement has been filed on behalf of the Appellee, Lisa Krueger. Said response is joined in by the Movant on behalf of Baby Girl K.

Respectfully submitted,

JAMES KURTH
Guardian ad Litem for Baby Girl K
128 Grand Avenue
P.O. Box 1547
Wausau, WI 54401
(715)845-2174

January 11, 1984

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

IN THE INTEREST OF BABY GIRL K.,

a person under the age of 18:

LISA KRUEGER,

PETITIONER-RESPONDENT-RESPONDENT,

V.

BRYON BUHSE,

RESPONDENT-APPELLANT-PETITIONER.

Case No. 82-087

BRIEF OF RESPONDENT-APPELLANT-PETITIONER

On Review From the Wisconsin Court of Appeals, District III

Gerhardt F. Getzin
Getzin & Jannetta
Attorneys for Respondent-Appellant-Petitioner
P. O. Box 951
Wausau, Wisconsin 54401

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STATEMENT OF ISSUES

1. WERE SUFFICIENT FINDINGS MADE BY THE TRIAL COURT TO SUPPORT A TERMINATION OF PARENTAL RIGHTS?

The trial court made no findings as to parental unfitness of the appellant.

2. DOES WIS. STAT. SECTION 48.415(6)(a)2 ALLOW FOR TERMINATION OF PARENTAL RIGHTS WHEN THE FATHER WAS IMPRISONED FROM THE FIFTH MONTH OF PREGNANCY ON AND THE TRIAL COURT FOUND THE FATHER DID NOT HAVE THE ABILITY TO EXERCISE SIGNIFICANT PARENTAL RESPONSIBILITY?

The trial court decided this question in the affirmative.

3. DOES WIS. STAT. SECTION 48.415(6)(a)2 VIOLATE THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING FATHERS OF ILLEGITIMATE CHILDREN EQUAL PROTECTION OF THE LAWS?

This question was not presented to the trial court.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION OF OPINION

There should be oral argument in this matter due to the involved nature of the proceedings which could be clarified further upon questioning of the court, and due to the importance of the issues raised.

The opinion should be published in this matter only if the court reaches the constitutional or statutory construction issues which are

raised. If the matter is resolved by dealing only with the sufficiency of the findings of fact regarding unfitness of the appellant, there should be no publication.

STATEMENT OF THE CASE

On March 17, 1981 Baby Girl K was born to Lisa Krueger, petitioner-respondent-respondent in Wausau, Wisconsin. The parents of the child were not married. Record, 58. Bryon Buhse, the father of the child, respondent-appellant-petitioner in this matter, was incarcerated in November of 1980, about five months into the pregnancy of Baby Girl K.

At the time Mr. Buhse was initially imprisoned, he and the mother had plans to marry. Ms. Krueger changed her mind about marriage before the child was born. The child was placed in a foster home immediately after birth. Record, 70, pages 29 and 31.

Bryon Buhse paid for the mother's dental expenses after she became pregnant. Lisa Krueger wrote to Brian Buhse telling him not to worry about expenses related to the pregnancy. The expenses were not more than $500.00. Lisa Krueger admitted it was Bryon Buhse's intention to support the child. Record, 70, pages 26-29. Lisa Krueger admitted she could not say Bryon Buhse could not support the child. He was willing to support Lisa and the child without expense to the state by providing living arrangements with his mother's family. Record 70, page 32.

On March 25, 1981 a petition for termination of parental rights of both parents was filed by the Marathon County Department of Social Services. Record, 1. Mr. Buhse did not consent to the termination of his rights. The petition was then dismissed. Record, 66, page 7.

A petition for determination of the status of the child (hereinafter referred to as "CHIPS proceedings") was then filed. Record, 19. Mr. Buhse had previously filed a declaration of parental interest. Record, 17. Mr. Buhse appeared in the CHIPS proceedings and let it be known that he was recommending to the court that the child be placed with Mr. Buhse's mother's family. Record, 66, page 2. A petition for determination of paternity and custody was then filed by Mr. Buhse. Record, 21. Subsequently, Ms. Krueger filed a petition for termination of the parental rights of Mr. Buhse under Wis. Stat. Section 48.415(6). Record, 28. The actions included the action for determination of paternity, an action for custody by Mr. Buhse in his petition for determination of paternity, the CHIPS proceedings and the action for termination of Mr. Buhse's parental rights. These actions were consolidated. Record, 68, page 6.

On December 23, 1981 the trial court granted Mr. Buhse's motion for summary judgment and adjudged him the father of the child. A hearing was then held on the petition for termination of parental rights. The petition was granted. Record, 58 and 63. The trial court found that Mr. Buhse had failed to assume parental responsibility within the meaning of Wis. Stat. Section 48.415(6)2. Appendix A, Record, 58. In its findings of facts the court found, among other things, that Mr. Buhse neglected to provide care or support to Ms. Krueger during her pregnancy even though he had the opportunity and ability to do so, that he failed to present evidence of any attempts on his part to establish a parental relationship, and that he failed to make any attempt to contribute towards the medical expenses occasioned by the pregnancy and delivery.

In his opinion issued from the bench at the conclusion of the hearing Judge Crooks found that, "Admittedly, Mr. Buhse did not have the opportunity to exercise 'significant responsibility' but he did accept that he was the father", that Mr. Buhse expressed an interest for both the child and the mother, and that he intended to marry her. Record, 70, page 51. Judge Crooks also stated:

> "It is clear, and the Court finds that during his incarceration Mr. Buhse is not earning anything more than any prisoner of the State of Wisconsin earns. But, that is since November of 1980. ... This Court does find that preliminary to his incarceration Mr. Buhse was able to provide care and support and failed to do so."

Record, 70, page 52.

No findings were made by the trial court regarding the parental unfitness of the appellant. No findings were made by the trial court as to whether Ms. Krueger met her burden of presenting clear and convincing evidence that appellant's parental rights should be terminated.

A notice of appeal from the judgment of termination of his parental rights was filed by Mr. Buhse on January 12, 1982. Record, 59. The Court of Appeals, District III, affirmed the trial court. This court has granted a petition for review.

STATUTE INVOLVED

48.415 GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS. ...

(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and:

. . .

2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although he had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so.

ARGUMENT

I. STANDARD OF REVIEW: THIS COURT MAY INDEPENDENTLY REVIEW THE QUESTIONS OF LAW PRESENTED.

The three issues which are being presented to the court on this petition for review are questions of law. Ordinarily, the scope of appellate review of an order terminating parental rights is limited to the questions of whether the trial court's findings are against the great weight and clear preponderance of the evidence and whether the court abused its discretion. In Matter of Termination of Parental Rights to Kegel, 85 Wis.2d 574, 579, 271 N.W.2d 114 (1978). Review of conclusions of law, however, do not fall within the rule that the findings of a trial court should not be disturbed. Such findings may be disregarded as pure error of law where they are not in accord with the views of the reviewing court. Stradinger v. City of Whitewater, 89 Wis. 2d 19, 277 N.W. 2d 827 (1979), Goebel v. Wat Exchangors, Inc., 88 Wis. 2d 596, 277 N.W. 2d 755 (1979) and Larson v. Department of Industry, Labor and Human Relations, 76 Wis. 2d 595, 252 N.W. 2d 33 (1977). If the issue is a question of law it may be redetermined independently by this court on review. Stradinger v. City of Whitewater, 89 Wis. 2d 19, 31, 277 N.W. 2d 827 (1979) citing Zweck v. D P Way Corp., 70 Wis. 2d 426, 435, 436, 234 N.W. 2d 921 (1975).

II. THE TRIAL COURT DID NOT MAKE SUFFICIENT FINDINGS TO SUPPORT A TERMINATION OF PARENTAL RIGHTS

The trial court did not make any findings of fact or conclusions of law relating to fitness of the appellant as a parent. The fundamental liberty interest of parent in his child requires such a finding before his rights are terminated.

A. A fundamental liberty interest of the parent is affected by a court order terminating his parental rights.

Brian Buhse's right to raise, support and visit his child in an environment free from governmental interference is at the base of all of the issues being presented to this court. Parents' rights associated with raising and associating with their children have been highly respected and given great protection by the courts.

In Stanley v. Illinois, 405 U.S. 645, 651 (1972), a case where the question was whether a presumption that distinguishes and burdens all unwed fathers was constitutionally repugnant, the Court said the following:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535 (1942) and [r]ights far more precious...than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska;

supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

In Alsager v. District Court of Polk County, 406 F. Supp. 10, 15, 16 (S.D. Iowa C.D. 1975), a case dealing with an Iowa parental termination statute, the nature of the fundamental constitutional right was discussed:

> A plethora of opinions by the United States Supreme Court, addressed to the nature of constitutional interests implicated where various aspects of family life are threatened, indicate that the Alsagers have a fundamental right to family integrity.
>
> In Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Supreme Court upheld the right of parents to have their children taught the German language. The Court determined that the "liberty" guaranteed by the Fourteenth Amendment "without doubt, . . . denotes . . . the right of the individual . . . to marry, establish a home and bring up children." Id. at 399, 43 S.Ct. at 626. Similarly, in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." Id. at 534-535, 45 S.Ct. at 573. In Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court noted that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. . . . And it is the recognition of this that these decisions (Meyer and Pierce) have respected the private realm of family life which the state cannot enter." Id. at 166, 64 S.Ct. at 442.
>
> This "liberty" right was similarly recognized in Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), where the Court emphasized the fundamental nature of the constitutionally protected right to marry and to procreate while invalidating a statute allowing the sterilization of habitual criminals. In May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953), the Court denied full faith and credit to an ex parte custody decree, noting that the Fourteenth Amendment's liberty included a parent's "immediate right to the care, custody, management and companionship of . . . minor children." Id. at 533, 73 S.Ct. at 843. More recently, in Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), the Court

invalidated mandatory leave provisions for pregnant school teachers because they unnecessarily interfered with the decision to raise a family. The Court observed that the "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Id., 94 S.Ct. at 796, 39 L.Ed.2d at 60.

Other decisions, while premised on a "privacy" rather than a "liberty" rationale, have shown a similar solicitude for the family enclave. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). In Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Court acknowledged the right to family integrity in declaring Illinois' dependency statute unconstitutional for depriving unmarried fathers of the care and custody of their natural children on the death of their mother. In the words of the Court, "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." (citations omitted) Id. at 651, 92 S.Ct. at 1213.

Finally, in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the United States Supreme Court addressed the pertinence of many of its above-mentioned decisions to the abortion context. The Court noted that while privacy is not explicitly mentioned in the Constitution, a right to a "guarantee of certain areas or zones" of privacy includes only those rights that are "implicit in the concept of ordered liberty," such as "activities relating to marriage . . . procreation . . . contraception . . . family relationships. . . and child rearing and education. Id. at 152, 93 S.Ct. at 726 (citations omitted). The Court further stated its belief that the privacy right is "founded in the Fourteenth Amendment's concept of personal liberty." Id. at 153, 93 S.Ct. at 727.

The inescapable conclusion arising from the foregoing authorities is that the Alsagers possess a fundamental "liberty" and "privacy" interest in maintaining the integrity of their family unit. See generally, Note, Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy, 88 Harv.L.Rev. 1001, 1014-15 (1975). It is this fundamental right to family integrity, protected by the Due Process Clause of the Fourteenth Amendment, which is menaced by Iowa's parental termination statute.

Recently the United States Supreme Court reaffirmed the importance of and protection given to parental rights in Santosky v. Kramer, ___ U.S.___, 102 S.Ct. 1388, 1394 (1982):

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

This court has indicated that filial relationships are basic to our social structure, that in the absence of a factual basis for legal interference with the family the bonds should not be disturbed, that fundamental rights of a parent are affected by termination of parental rights proceedings and that the rights of the parent must be accorded a high order of respect and must be considered paramount until circumstances show that the parent has forfeited these rights. In the Matter of Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 688, 689, 291 N.W.2d 660 (1981). As will be seen below this court has provided that this fundamental right must be accorded specific protections in a proceeding to terminate parental rights.

B. A Finding That The Parent Is Unfit Is Necessary Before A Parent's Rights Are Terminated.

In proceedings where a petition to terminate parental rights is contested, a fact finding hearing is to be held to determine whether

grounds for termination can be proven. If the grounds for termination are found, the court then proceeds to determine what disposition is in the best interest of the child. Wis. Stat. Section 48.424.

The grounds for termination in a contested proceeding are set out in Wis. Stat. Section 48.415. The existence of the statutory grounds does not require the court to terminate. The trial court has to consider all the circumstances and exercise its sound discretion as to whether termination would promote the best interests of the child. In the Interest of J.L.W., 102 Wis.2d 118, 130, 306 N.W.2d 46 (1981).

A contested termination proceeding involves a three step process: 1. a finding by a jury or the court that statutory grounds for termination under Wis. Stat. Section 48.415 have been met, 2. a finding by the court that termination is in the best interest of the child, and 3. a determination of disposition or placement of the child under Wis. Stat. Section 48.427.

This court has added the requirement, which is not present in the statutes, that, except under unusual circumstances like those in Quilloin v. Walcott, 434 U.S. 246 (1978), due process requires that the court must make a finding that the parent is unfit if his rights are to be terminated. In the Interest of J.L.W., 102 Wis.2d 118, 136, 306 N.W.2d 46 (1981). In Quillon, the father was attempting to block an adoption and seek visitation rights eleven years after the child's birth. The father in Quillon had never attempted to assert any legal rights up to that time. Quillon, 434 U.S.at 249.

Although the trial court did make findings relating to grounds for termination under Wis. Stat. Section 48.415(6)2 and found that termination was in the best interests of the child, Record, 58, no

finding was made as to the parental fitness of Mr. Buhse. Since no such finding was made, the trial court's decision cannot be affirmed. J.L.W., 102 Wis.2d at 136.

The testimony given at the termination proceedings does not deal with parental fitness. No evidence appears in the record that the father so conducted himself or had shown himself to be a person of such description that it was essential to the child's safety and welfare that his rights should be treated as lost or suspended.

> The standards for a finding of unfitness in Wisconsin have long deferred as much as possible, to parental rights. When fitness is found, however it must be based on most substantial grounds. The standards for unfitness have long been stringent. To support a finding of unfitness, "it must appear that the [parent] has 'so conducted himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended,--should be superseded or interfered with." [emphasis added] Lemmin v. Lorfeld, 107 Wis. 264, 266, 83 N.W. 359, 360 (1900). It is evident, then, that a finding of unfitness is a determination that further contact between parent and child will be seriously detrimental to the child.

In the Matter of Termination of Parental Rights to A.M.K., 105 Wis.2d 91, 102, 312 N.W.2d 840 (Wis. App. 1981) [Emphasis in original].

Since a finding of unfitness cannot be sustained on the record, the trial court's decision terminating Mr. Buhse's rights should be reversed. See J.L.W., 102 Wis.2d at 137, 140, finding the record could not sustain a finding of unfitness and reversing the trial court.

If this court does not wish to review the record in this matter in order to determine if the record could sustain a finding of unfitness it may remand to the trial court for adequate findings as was done in T.R.M., 100 Wis.2d at 689-690.

III. WIS. STAT. SECTION 48.415(6)2 DOES NOT ALLOW FOR TERMINATION OF PARENTAL RIGHTS WHERE THE FATHER DID NOT HAVE THE OPPORTUNITY TO EXERCISE SIGNIFICANT PARENTAL RESPONSIBILITY.

This court should find as a matter of law that Wis. Stat. Section 48.415(6)2 does not allow for termination of parental rights where the trial court found that the father did not have the opportunity to exercise significant parental responsibility. The trial court in its decision from the bench found that the appellant did not have the opportunity to exercise significant parental responsibility. Record, 70, page 51. Facts which are stated in a trial court's memorandum decision will be accorded the same weight as if contained in formal findings. Koeb v. Schroedel, 93 Wis. 2d 207, 286 N.W.2d 589 (1980). The trial court then found as a matter of law that no substantial parental relationship was established. Record, 58.

Substantial parental relationship as defined by Wis. Stat. Section 48.415(6)2(b) means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. The factors in the statute which are used in determining whether a substantial parental relationship is established are "whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so."

Mr. Buhse did not have the opportunity to establish a substantial parental relationship with the child since he has been incarcerated ever since the mother was five months pregnant. Record, 70, page 29.

While the trial court found that appellant had the opportunity to establish a substantial parental relationship, the court apparently based

its findings on opportunities before incarceration. At page 51 of the transcript of the final hearing the court states: "Admittedly, Mr. Buhse did not have the opportunity to exercise 'significant responsibility' but he did accept the fact he was the father. ... So, the Court has the right to consider the conduct of Mr. Buhse during the time that the child was in the gestation period and before delivery..." Record, 70, page 51. Since the trial court made the finding of fact that the appellant did not have the opportunity to exercise significant responsibility, this court should hold as a matter of law that Mr. Buhse's rights cannot be terminated.

This court should also hold as a matter of law that conduct during gestation alone is not enough to warrant termination of parental rights. Wis. Stat. Section 48.415(6)2(b) lists a number of factors "including, but not limited to whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so." While conduct during gestation is a factor in determining the nature of the relationship, to hold that a person's parental rights can be terminated for not establishing a substantial parental relationship before the birth of the child (for five months in this case) would be a construction of the statute that would render it unconstitutional. See Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972), Santosky v. Kramer, ___ U.S. ___, 102 S.Ct. 1388, 1394 (1982), In the Matter of Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 688, 689, 291 N.W.2d 660 (1981), Alsager v. District Court of Polk County, 406 F. Supp. 10, 16

(S.D. Iowa C.D. 1973), and section II. A. and IV of this brief regarding protection given the fundamental right of parenting. Statutes whenever possible must be construed as constitutional. State ex. rel. Real Est. Exam. Bd. v. Gerhardt, 39 Wis. 2d 701, 711, 159 N.W.2d 622 (1968).

It simply would not be fundamentally fair to terminate a parent's rights based solely on lack of a relationship or support during pregnancy. If this was allowed by the court most children born outside of marriage would never have the chance to have a relationship with their natural fathers if a petition for termination would be filed. This court should construe Wis. Stat. Section 48.415(6)2(b) in such a way that conduct during pregnancy alone, for purposes of that subsection, is not enough to warrant termination of parental rights.

IV. WIS. STAT. SECTION 48.415(6)2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION.

Wis. Stat. Section 48.415(6)2 violates the equal protection clause of the 14th Amendment to the United States Constitution since it discriminates against unwed fathers. This discrimination is not supported by any compelling or substantial state interest. This subsection of the statute should be declared invalid for this reason.

Since this issue was not raised in the trial court, it must be determined whether this question is within this court's scope of review.

A. Scope of review of the constitutional question.

The constitutional issues in this matter are being raised for the first time on appeal. The Attorney General has been notified of this appeal and has been invited to submit briefs and argue. He has indicated he shall not take part in the appeal. See letters of April 5, 1982, and May 7, 1982, in Clerk's file.

There are no unresolved factual issues which bear on the constitutional issue in this matter that need resolution. The parties will not be prejudiced nor will the relevant arguments before the court suffer due to the failure to raise the issues in the trial court.

The constitutional question is a broad one. The question of discrimination against such a broad and easily defined class is not affected by the different circumstances in the records of various termination matters under the statute in question. Therefore it is clearly in the public interest and in the interests of justice to resolve the constitutional question at this time in this case.

It is clear, then, that the court should reach the constitutional issues since the factors outlined in Laufenberg v. Cosmetology Examining Board, 87 Wis. 2d 175, 187, 274 N.W. 2d 618 (1979) have been met.

Since the Attorney General has been invited to participate in these proceedings and there is no prejudice to the state due to lack of prior notification, there is no need for refusing to consider the constitutional issues. In the Matter of Estate of Fessler, 100 Wis. 2d 437, 444, 302 N.W. 2d 818 (1981).

B. Wis. Stat. Section 48.415(6)2 violates of the equal protection clause since it discriminates against unwed fathers.

Subsection (6) of the statute applies only to unwed fathers. No similar provision applies to unwed mothers or married fathers and mothers. The other grounds upon which parental rights can be terminated are found in subsections (1) through (5) of the statute. The grounds in those sections are much more stringent and apply equally to unwed fathers, unwed mothers and married parents.

Subsection (6)2 presumes without justification that unwed fathers are more likely to be unfit to retain their parental rights and therefore should be put to a stricter test than unwed mothers. The statute narrows in on a period in the pregnancy and life of the child that is often a matter of months. The unwed father must "prove himself" in this period of time or lose his rights, whereas the unwed mother is treated the same as a married parent. The unwed mother's rights cannot be terminated under subsection (6) of the statute for the same conduct which would justify termination as to the unwed father.

1. The court should strictly scrutinize the statute in deciding if it denies unwed fathers equal protection of the laws.

The strict scrutiny test used in analysis of Equal Protection issues is triggered if a statute impinges on fundamental freedoms. If a fundamental right is involved, the statutory classification has to be necessary to the achievement of a compelling state interest and the statute must be narrowly drawn to express only legitimate state interests at stake. Roe v. Wade, 410 U.S. 113, 155 (1973), Eisenstadt v. Baird, 405 U.S. 438, 447 (1972), Dunn v. Blumstein, 405 U.S. 330 (1972) and Skinner v. Oklahoma, 316 U.S. 535 (1942).

As discussed in part II. A. of this brief, it is clear that the United States Supreme Court and Wisconsin Supreme Court have determined that the rights of a parent regarding his child are fundamental rights protected by the Due Process Clause and other Amendments of the United States Constitution.

The Wisconsin Court of Appeals in In the Matter of the Termination of Parental Rights to A.M.K., 105 Wis.2d 91, 312 N.W.2d 840 (Wis. App. 1981), citing Alsager v. District Court of Polk County, 406 F. Supp. 10, 16 (S.D. Iowa C.D. 1975) indicated that the state may not interfere with parental rights absent a compelling reason for doing so.

As shown below, only broad gender based generalizations could support the discrimination present in the statute. It is clear upon reading the other grounds for termination in the statute such as abandonment, continuing need of protection or services, and parental disability, that a child's best interests are adequately protected against the abuses and abdication of responsibility of all parents under those subsections. No compelling state interest is served by subjecting unwed fathers, or any parents, to the grounds for termination set out in subsection (6), since adequate protection for the best interests of children is provided in the other subsections. On the other hand, unwed father's rights are subjected to great danger. In this case, even though the father has: 1. made an offer of support of the mother and child through the maternal grandmother, 2. had intended to marry the mother, 3. filed a declaration of parental interest before the termination action was commenced, and 4. commenced an action for paternity and custody before the termination action commenced, the trial court decided to terminate his rights because he

did not contribute to some expenses during pregnancy which did not amount to more than $500.00.

Even assuming that there may be a compelling interest, the statute is not drawn narrowly to protect the fundamental rights of the unwed fathers. Opportunities are provided to trial courts to terminate rights, as in this case, on limited instances of conduct or lack of conduct which may have occurred even before or within a few days or months after the child's birth. The father is only give until adjudication of paternity to accept and exercise the conduct called for.

As in this case, it is not crucial to the best interest of the child that the parent be restricted to such a potentially short period of time within which to come within the conduct called for in the statute. If an unwed father has abandoned, negiected or abused the child, or refused to support the child there are no special circumstances imaginable which call for special treatment regarding unwed fathers, except for those instances where the identity of the father is not established. That situation is adequately provided for by subsection (6)1. It appears that the statute was drafted with the unknown and uncaring father in mind. The broad strokes of (6)2, however, have no relation to the difficult situation of the unknown father, since establishment of paternity is a pre-condition to the application of that subsection.

2. The grounds for termination that appear in subsection (6)2 of the statute are not related to any substantial state interest.

If this court finds that the strict scrutiny test regarding analysis under the Equal Protection Clause does not apply to this case, it must be shown that the statute is related to a substantial state interest.

As shown above and as indicated by the United States Supreme Court in Caban v. Mohammed, 441 U.S. 384 (1979) there may be need to establish different criteria to deal with the special difficulties of locating unwed fathers. This problem is dealt with in Wisconsin in subsection (6)1. Insofar as subsection (6)2 discriminates against unwed fathers, it must be found to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Two United States Supreme Court cases dealt with invalid statutes that also discriminated against unwed fathers proceedings dealing with parents' rights. Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammed, 441 U.S. 384 (1979) found state statutes discriminating against unwed fathers unconstitutional on equal protection grounds.

In Stanley the Court struck down an Illinois statute which presumed that unwed fathers were unfit parents and did not allow such fathers process by which they could prove their fitness.

> We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant? We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

Stanley v. Illinois, 405 U.S. 645, 650 (1972).

Recently in holding a New York law discriminated against unwed fathers the Court provided guidance as to how to determine whether such discrimination is invalid under the equal protection clause. In Caban v. Mohammed, 441 U.S. 384 (1979) a statute did not allow unwed fathers the same authority to block adoptions as was afforded to unwed mothers. (This decision did not discuss the implication of the fundamental right of parenting triggering the strict scrutiny test.) In support of its holding that the statute violated the Constitution the Court said as follows:

> Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammed's adoption of the children would not be in the childrens' best interest. Accordingly, it is clear that Section 111 treats unmarried parents differently according to their sex.
>
> Gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. (citations omitted) The question before us, therefore, is whether the distinction in Section 111 between unmarried mothers and unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified by a fundamental difference between maternal and paternal relations--that "a natural mother, absent special circumstances, bears a closer relationship with her child than a father does." Tr. of Oral Arg. 41.
>
> Contrary to appellee's argument and to the apparent presumption underlying Section 111, maternal and paternal roles are not invariably different in importance. ... We reject, therefore, the claim that the broad, gender based distinction in Section 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

Caban, at 393 (emphasis added). This analysis regarding gender discrimination has been applied by this court in Marshfield Clinic v. Discher, 105 Wis.2d 506, 314 N.W.2d 326 (1981). The United States Supreme Court has also expounded on the analysis of gender discrimination in Mississippi University for Women v. Hogan, 50 U.S.L.W. 5068, 5070-71 (1982) where Justice O'Connor wrote the following:

> Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. ... That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. ... Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. ... The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." ...
>
> Although the test for determining the validity of a genderbased classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. ...
>
> If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men an women." The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification" ... to establish a link between objective and classification.

It is true the Court in Caban mentioned that the difficulty of locating and identifying unwed fathers at birth may justify a legislative distinction between mothers and fathers of newborns. See Caban, 441 U.S. at 393 and 393 n. 11 (1979). Wisconsin has dealt with that problem under subsection (6)1 of the statute. Subsection (2) does not relate to any such problem. The reason for subsection (6)2 apparently is the same one rejected by the Court in Caban, i.e., a broad gender-based distinction.

Appellant can present no reasons for the existence of this subsection other than the State's presumption that unwed fathers are more often unfit parents of children than unwed mothers and therefore it should be easier to terminate their parental rights. See Drafting Records, Chapter 330, Section 6, Laws of 1979, Legislative Reference Bureau, which do not disclose any reason for the addition of sub 6.

As shown above the presumption that unwed fathers are more often unfit has been rejected by the Court as justifying the statute. Just as in Caban, this statute is another example of "overbroad generalizations" in gender based classifications. Just as in Caban the "facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children." Id., 395. Just as in Hogan, this statute discriminates because the statute reflects archaic and stereotypic notions and discriminates against one gender because it is presumed to suffer from an inherent handicap or is assumed to be innately inferior.

Wis. Stat. Section 48.415(6)2 should be declared unconstitutional under the Fourteenth Amendment to the United States Constitution for these reasons.

CONCLUSION

The trial court should be reversed and the parental rights of the appellant should be reinstated. On remand the case should proceed to the dispositional stage of the proceedings to determine custody of the child.

DATE: November 30, 1982

Respectfully submitted,

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APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

IN THE INTEREST OF BABY GIRL K.,

a person under the age of 18:

LISA KRUEGER,

PETITIONER-RESPONDENT-~~PETITIONER~~,

v.

BRYON RUHSE,

RESPONDENT-APPELLANT-PETITIONER.

Case No. 87-087

REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

On Review From the Wisconsin Court of Appeals, District III

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ARGUMENT

I. NO FACTUAL ISSUES NEED TO BE RESOLVED IN ORDER TO PROPERLY DECIDE THE CONSTITUTIONAL QUESTIONS.

Petitioner-respondent argues in her brief that no factual foundation has been presented in the trial court upon which to decide the constitutional issues in this matter. It is not indicated, however, which factual issues need resolution. The constitutional issues are broad ones which affect every case coming under the statute. The classes affected by the discrimination are easily defined. Petitioner-respondent presents no support whatsoever to the arguments that more facts are needed or that it is in the interest of justice that these issues not be reached. No mention is made regarding possible prejudice to petitioner-respondent as a result of the issues not being raised in the trial court.

On the other hand, all unwed fathers and their children who are affected by the statute have to live with the consequences of the discrimination until this court resolves the issues. Under the criteria of Laufenberg v. Cosmetology Examining Board, 87 Wis. 2d 175, 274 N.W. 2d 618 (1979) it is abundantly clear that this court should reach the constitutional issues.

II. PETITIONER-RESPONDENT PRESENTS NO ARGUMENT ON THE EQUAL PROTECTION ISSUES OTHER THAN BROAD BASED GENDER DISTINCTIONS.

Petitioner-respondent has failed to show any reason for the discrimination present in the statute except that of a broad, gender-based distinction. There is confusion in her argument regarding the apparent purposes of the statute.

At page 7 of her brief, the petitioner-respondent argues that the maternity of the mother cannot be questioned. This statement of the the petitioner-respondent seems to imply that the purpose that the statute serves relates to difficulties in determining paternity. Subsection (2) of the statute, the provision being challenged, does not relate to or solve any such problems.

Other statements are made on page 7 that seem to indicate that mothers inherently have greater love for their children than fathers and that mothers never neglect or refuse to provide care and support for their children. For instance it is said, "The mother necessarily has a substantial relationship with her child." Under the definition of substantial relationship in the statute this would mean that mothers always accept and exercise significant responsibility for the daily supervision, education, protection and care of the child. It is interesting to note, in this regard, that the child concerned in this matter has never been seen by the mother since birth. Record, 70, page 22. The argument goes, apparently, that since fathers love and care for their children less than mothers, that the fathers should have only until paternity is determined to establish that they are entitled to carry on the responsibilities of parenting, while mothers should not have their rights terminated under the same circumstances. Broad, gender-based distinctions are the only support for petitioner-respondent's argument.

Petitioner-respondent does not even discuss the standard for determining constitutionality of gender-based distinctions or the clearly applicable language regarding broad-based gender distinctions under Caban v. Mohammed, 441 U.S. 380, 393 (1979) which was discussed in

respondent-appellant-petitioner's brief, much the less the standard of strict scrutiny.

III. THE TRIAL COURT TERMINATED THE PARENTAL RIGHTS DUE TO CONDUCT DURING PREGNANCY.

In sections IV and VI of her brief the petitioner-respondent argues that the trial court properly terminated parental rights due to conduct during and after pregnancy. At page 2 of her brief, in her statement of facts, petitioner-respondent asserts that the issues before the trial court were 1. whether Mr. Ruhse ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy; and 2. whether Mr. Ruhse neglected or refused to provide care or support even though he had the opportunity or ability to do so. The trial court found that Mr. Ruhse did not have the opportunity to exercise significant parental responsibility. Record, 78, page 51. Even petitioner-respondent's brief confirms the feeling of the trial court behind this finding by saying on page 14-15 that the trial court considered the difficulty of establishing a parental relationship while in prison.

Apparently the petitioner-respondent is of the opinion that a "minimal expression of concern" while in prison, page 15 of petitioner-respondent's brief, would have resulted in a judgment favorable for petitioner. These are strange words to use when a substantial parental relationship must be shown in order to avoid termination. It is also ironic that such argument appears in a situation where the father intended to marry the mother, her dental expenses were paid by him, the father's family offered to support the mother and

child in their own home, the father filed a declaration of parental interest and the father filed for determination of paternity and custody.

IV. A SPECIFIC FINDING OF PARENTAL FITNESS IS MANDATED.

In section V of her brief petitioner-respondent argues that a specific finding of parental unfitness is not necessary in this matter. Petitioner-respondent argues that the circumstances of this case are similar to the unusual circumstances of Quilloin v. Walcott, 434 U.S. 246 (1978) referred to in In the Interest of J.L.W., 102 Wis. 2d 118, 136, 306 N.W. 2d 46 (1981). A failure to assert any parental rights or render any support for a period of eleven years is obviously quite different from the circumstances in this matter. Moreover, "a decision that requires the exercise of discretion and on its face demonstrates no consideration of any of the factors on which the decision should be properly based constitutes an abuse of discretion." In the Matter of Guardianship of Wisnewski, 100 Wis. 2d 391, 396, 302 N.W. 2d 79 (1980).

Since no findings were made regarding unfitness "the court should decline to review the record anew in to make its own determination since the record is seldom adequate to make the necessary factual determinations that are a part of this type of controversy." In the Matter of Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 689, 291 N.W. 2d 460 (1981).

V. IT WAS THE PETITIONER-RESPONDENT'S BURDEN OF PROOF TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE FATHER'S RIGHTS SHOULD BE TERMINATED.

At page 4 and elsewhere of her brief petitioner-respondent refers to a lack of proof by respondent-appellant-petitioner. Mr. Ruhse was

under no burden whatsoever to produce any proof. Rather, the burden of proof in this matter was on the petitioner-respondent under Wis. Stat. s. 48.31(1).

CONCLUSION

The trial court should be reversed and the parental rights of the appellant should be reinstated. On remand the case should proceed to the dispositional stage of the proceedings to determine custody of the child.

DATE: January 3, 1983

Respectfully submitted,

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APPENDIX G

IN THE COURT OF APPEALS FOR THE STATE OF WISCONSIN

DISTRICT III

IN THE INTEREST OF BABY GIRL K.,

a person under the age of 18:

LISA KRUEGER,

PETITIONER-RESPONDENT,

V.

BRYON BUHSE,

RESPONDENT-APPELLANT.

Case No. 82-087

BRIEF OF APPELLANT

On appeal from the Marathon County Circuit Court,
the Honorable Leo D. Crooks, presiding.

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STATEMENT OF ISSUES

1. DOES WIS. STAT. SECTION 48.415(6)(a)2 VIOLATE THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION BY DENYING FATHERS OF ILLEGITIMATE CHILDREN EQUAL PROTECTION OF THE LAWS?

This question was not presented to the trial court.

2. DOES WIS. STAT. SECTION 48.415(6)(a)2 ALLOW FOR TERMINATION OF PARENTAL RIGHTS WHEN THE FATHER WAS IMPRISONED FROM THE FIFTH MONTH OF PREGNANCY ON AND THE TRIAL COURT FOUND THE FATHER DID NOT HAVE THE ABILITY TO EXERCISE SIGNIFICANT PARENTAL RESPONSIBILITY?

The trial court decided this question in the affirmative.

3. WERE SUFFICIENT FINDINGS MADE BY THE TRIAL COURT TO SUPPORT A TERMINATION OF PARENTAL RIGHTS?

The trial court made no findings as to parental unfitness of the appellant.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION OF OPINION

There should be oral argument in this matter due to the involved nature of the proceedings which could be clarified further upon questioning of the court, and due to the importance of the issues raised.

The opinion should be published in this matter only if the court reaches the constitutional or statutory construction issues which are raised. If the matter is resolved by dealing only with the sufficiency of the findings of fact regarding unfitness of the appellant, there should be no publication.

STATEMENT OF THE CASE

On March 17, 1981 Baby Girl K was born to Lisa Krueger in Wausau, Wisconsin. The parents of the child were not married. Record, 58. Bryon Buhse, the father of the child, appellant in this matter, was incarcerated in November of 1980, about five months into the pregnancy of the child concerned. At the time Mr. Buhse was

initially imprisoned, he and the mother had plans to marry. Ms. Krueger changed her mind about marriage before the child was born. The child was placed in a foster home immediately after birth. Record, 70, pages 29 and 31.

On March 25, 1981 a petition for termination of parental rights of both parents was filed by the Marathon County Department of Social Services. Record, 1. Mr. Buhse did not consent to the termination of his rights. The petition was then dismissed. Record, 66, page 7.

A petition for determination of the status of the child (hereinafter referred to as "CHIPS proceedings") was then filed. Record, 19. Mr. Buhse had previously filed a declaration of parental interest. Record, 57. Mr. Buhse appeared in the CHIPS proceedings and let it be known that he was recommending to the court that the child be placed with Mr. Buhse's mother's family. Record, 66, page 2. A petition for determination of paternity and custody was then filed by Mr. Buhse. Record, 21. Subsequently, Ms. Krueger filed a petition for termination of the parental rights of Mr. Buhse under Wis. Stat. Section 48.415(6). Record, 28. The actions included the action for determination of paternity, an action for custody by Mr. Buhse in his petition for determination of paternity, the CHIPS proceedings and the action for termination of Mr. Buhse's parental rights. These actions were consolidated. Record, 68, page 6.

On December 23, 1981 Mr. Buhse was adjudged the father of the child and his parental rights were terminated. Record 58 and 63. The trial court found that Mr. Buhse had failed to assume parental responsibility within the meaning of Wis. Stat. Section 48.415(6)2. Appendix A, Record 58. In its findings of facts the court found that

Mr. Buhse neglected to provide care or support to Ms. Krueger during her pregnancy even though he had the opportunity and ability to do so. Several other findings were made at paragraphs 7, 8, 10, and 11 relating to the actions or lack of action of Mr. Buhse.

In his opinion issued from the bench immediately after the hearing Judge Crooks found that, "Admittedly, Mr. Buhse did not have the opportunity to exercise 'significant responsibility' but he did accept that he was the father", that Mr. Buhse expressed an interest for both the child and the mother, and that he intended to marry her. Record 70, page 51. Judge Crooks also stated:

> "It is clear, and the Court finds that during his incarceration Mr. Buhse is not earning anything more than any prisoner of the State of Wisconsin earns. But, that is since November of 1980. ... This Court does find that preliminary to his incarceration Mr. Buhse was able to provide care and support and failed to do so."

Record 70, page 52.

No findings were made by the trial court as to the parental unfitness of the appellant. No findings were made by the trial court as to whether Ms. Krueger met her burden of presenting clear and convincing evidence that appellant's parental rights should be terminated.

A notice of appeal from the judgment of termination of his parental rights was filed by Mr. Buhse on January 12, 1982. Record, 59.

STATUTE INVOLVED

48.415 GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS. ...

(6) FAILURE TO ASSUME PARENTAL RESPONSIBILITY. (a) Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and:

1. The person or persons who may be the father of the child have been given notice under s. 48.42 but have failed to appear or otherwise submit to the jurisdiction of the court and that such person or persons have never had a substantial parental relationship with the child; or

2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although he had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship' means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so.

ARGUMENT

I. WIS. STAT. SECTION 48.415(6)2 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION.

Wis. Stat. Section 48.415(6)2 violates the equal protection clause of the 14th Amendment to the United States Constitution since it discriminates against unwed fathers. This discrimination is not supported by any substantial state interest. This subsection of the statute should be declared invalid for this reason.

Since this issue was not raised in the trial court, it must be determined whether this question is within this court's scope of review.

A. Scope of review of the constitutional question.

The constitutional issues in this matter are being raised for the first time on appeal. The Attorney General has been notified of this

appeal and has been invited to submit briefs and argue. He has indicated he shall not take part in the appeal. See Appendix C.

There are no unresolved factual issues which bear on the constitutional issues in this matter that need resolution. The parties will not be prejudiced nor will the relevant arguments before the court suffer due to the failure to raise the issues in the trial court.

The constitutional questions are broad ones. The question of discrimination against such a broad and easily defined class is not affected by the different circumstances in the records of various termination matters under the statute in question. Therefore it is clearly in the public interest and in the interests of justice to resolve the constitutional questions at this time in this case.

It is clear, then, that the court should reach the constitutional issues since the factors outlined in Laufenberg v. Cosmetology Examining Board, 87 Wis. 2d 175, 187, 274 N.W. 2d 618 (1979) have been met.

Since the Attorney General has been invited to participate in this appeal and there is no prejudice to the state due to lack of prior notification, there is no need for refusing to consider the constitutional issues. In the Matter of Estate of Fessler, 100 Wis. 2d 437, 444, 302 N.W. 2d 414 (1981).

B. Wis. Stat. Section 48.415(6)2 is violative of the equal protection clause since it discriminates against unwed fathers.

Subsection (6) of the statute applies only to unwed fathers. No similar provision applies to unwed mothers or married fathers and mothers. The other grounds upon which parental rights can be

terminated are found in subsections (1) through (5) of the statute. They are much more stringent.

Subsection (6)2 presumes without justification that unwed fathers are more likely to be unfit to retain their parental rights and therefore should be put to a stricter test than unwed mothers. The statute narrows in on a period in the pregnancy and life of the child that is often a matter of months. The unwed father must "prove himself" in this period of time or lose his rights, whereas the unwed mother is treated the same as a married parent. The unwed mother's rights cannot be terminated under subsection (6) of the statute for the same conduct which would justify termination as to the unwed father.

The grounds for termination that appear in subsection (6)2 of the statute are not substantially related to any legitimate state interest. As shown below the United States Supreme Court has indicated in Caban v. Mohammed, 441 U.S. 384 (1979) that there may be need to establish different criteria to deal with the special difficulties of locating unwed fathers. This problem is dealt with in Wisconsin in subsection (6)1. Insofar as subsection (6)2 discriminates against unwed fathers, it must be found to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Two United States Supreme Court cases dealt with invalid statutes that also discriminated against unwed fathers in parental rights proceedings. Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammed, 441 U.S. 384 (1979) found state statutes discriminating against unwed fathers unconstitutional on equal protection grounds.

In Stanley the Court struck down an Illinois statute which presumed that unwed fathers were unfit parents and did not allow such

fathers process by which they could prove their fitness and prevent termination of their parental rights.

> We must therefore examine the question that Illinois would have us avoid: Is a presumption that distinguishes and burdens all unwed fathers constitutionally repugnant?
> We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

Stanley v. Illinois, 405 U.S. 645, 650 (1972).

Recently in holding a New York law discriminated against unwed fathers the Court provided guidance as to how to determine whether such discrimination is invalid under the equal protection clause. In Caban v. Mohammed, 441 U.S. 384 (1979) a statute did not allow unwed fathers the same authority to block adoptions as was afforded to unwed mothers. In support of its holding that the statute violated the Constitution the Court said as follows:

> Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of Abdiel Caban, as the unwed father of David and Denise, and Maria Mohammed, as the unwed mother of the children: Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammed's adoption of the children would not be in the childrens' best interest. Accordingly, it is clear that Section 111 treats unmarried parents differently according to their sex.
>
> Gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause. (citations omitted) The question before us,

> therefore, is whether the distinction in Section 111 between unmarried mothers and unmarried fathers bears a substantial relation to some important state interest. Appellees assert that the distinction is justified by a fundamental difference between maternal and paternal relations--that "a natural mother, absent special circumstances, bears a closer relationship with her child than a father does." Tr. of Oral Arg. 41.
>
> Contrary to appellee's argument and to the apparent presumption underlying Section 111, maternal and paternal roles are not invariably different in importance. ... We reject, therefore, the claim that the broad, gender based distinction in Section 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.

Id., 393 (emphasis added).

It is true the Court mentioned that the difficulty of locating and identifying unwed fathers at birth may justify a legislative distinction between mothers and fathers of newborns. See Caban v. Mohammed, 441 U.S. 384, 393 and 393 n. 11 (1979). Wisconsin has dealt with that problem under subsection (6)1 of the statute. Subsection (2) does not relate to any such problem. The reasons for subsection (6)2 apparently are the same ones rejected by the Court in Caban, i.e., a broad gender-based distinction. Appellant can present no reasons for the existence of this subsection other than the State's presumption that unwed fathers are more often unfit parents of children than unwed mothers and therefore it should be easier to terminate their parental rights. As shown above this reason has been rejected by the Court as justifying the statute. Just as in Caban, this statute is another example of "overbroad generalizations" in gender based classifications. Just as in Caban the "facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their

children." Id., 395. Wis. Stat. Section 48.415(6)2 should be declared unconstitutional under the Fourteenth Amendment to the United States Constitution for this reason.

II. WIS. STAT. SECTION 48.415(6)2 DOES NOT ALLOW FOR TERMINATION OF PARENTAL RIGHTS WHERE THE FATHER DID NOT HAVE THE OPPORTUNITY TO EXERCISE SIGNIFICANT PARENTAL RESPONSIBILITY.

This court should find as a matter of law that Wis. Stat. Section 48.415(6)2 does not allow for termination of parental rights where the father did not have the opportunity to exercise significant parental responsibility. The trial court found that the appellant did not have the opportunity to exercise significant parental responsibility. Record 70, page 51. However, the trial court then found as a matter of law that no substantial parental relationship was established. Record, 58. The rules of standard of review relating to findings of fact of a trial court do not apply to conclusions of law since the trial court is in no better position to reach a correct decision than is an appellate court. In Re Estate of Holcombe, 259 Wis. 642, 49 N.W.2d 918 (1950).

Some of the factors in Wis. Stat. Section 48.415(6)2(b) which are used in determining whether a substantial parental relationship is established are "whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so." It is the appellant's contention that he did not have the opportunity to establish a substantial parental relationship

with the child since he has been incarcerated ever since the mother was five months pregnant.

While the trial court found that appellant had the opportunity to establish a substantial parental relationship, the court apparently based its findings on opportunities before incarceration. At page 51 of the transcript of the final hearing the court states: "Admittedly, Mr. Buhse did not have the opportunity to exercise 'significant responsibility' but he did accept the fact he was the father. ... So, the Court has the right to consider the conduct of Mr. Buhse during the time that the child was in the gestation period and before delivery..." Record 70, page 51. Facts which are stated in a trial court's memorandum decision will be accorded the same weight as if contained in formal findings. Koeb v. Schroedel, 93 Wis. 2d 207, 286 N.W.2d 589 (1980).

Since the trial court made the finding of fact that the appellant did not have the opportunity to exercise significant responsibility, this court should hold as a matter of law that appellant's rights cannot be terminated.

This court should also hold as a matter of law that conduct during gestation alone is not enough to warrant termination of parental rights. Wis. Stat. Section 48.415(6)2(b) lists a number of factors "including, but not limited to whether the person has ever expressed concern for or interest in the support, care or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so." While conduct during gestation is a factor in determining the nature of the relationship, to hold that a

person's parental rights can be terminated for not establishing a substantial parental relationship before the birth of the child (for five months in this case) would be a gross misconstruction of the statute.

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, ___ U.S. ___, 102 S.Ct. 1388, 1394 (1982).

It simply would not be fundamentally fair to terminate a parent's rights based solely on lack of a relationship or support during pregnancy. If this was allowed by the court most children born outside of marriage would never have the chance to have a relationship with their natural fathers if a petition for termination would be filed. This court should construe Wis. Stat.

Section 48.415(6)2(b) in such a way that conduct during pregnancy alone, for purposes of that subsection, is not enough to warrant termination of parental rights.

Finally, even if the trial court properly based its judgment in part on lack of activity of appellant after he was in prison, this court should construe the statute to read that the appellant has not had the opportunity to establish a substantial parental relationship given the findings of fact of the trial court and the facts on record. As mentioned below in the third section of appellant's argument, a request by appellant during the proceedings to receive information about his

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supra, this matter should be reversed since the record does not support a finding of unfitness.

> When unfitness is found, however, it must be based upon most substantial grounds. The standards for unfitness have long been stringent. To support a finding of unfitness, "it must be appear that the [parent] has" so conducted himself, or shown himself to be a person of such description or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be suspended, should be superceded or interfered with. (citations omitted) It is evident, then, that a finding of unfitness is a determination that further contact between parent and child will be seriously detrimental to the child.

In the Matter of Termination of Parental Rights to A.M.K., 105 Wis. 2d 91, 102, 312 N.W.2d 840 (Wis. App.1982).

There is nothing in the record to show that contact between the child and appellant would be seriously detrimental to the child. While there was mention of one alleged incident of physical violence, the trial court found there was no pattern shown. Record, 51. Since appellant has been in prison he has not had a chance for any contact with the child, although he has attempted to make what little contact he could. Thruugh his attorney, the appellant indicated to the court on September 8, 1981 that the he had concern regarding information about the child and that the appellant had written to the foster parents to receive photographs and information and received no response. The trial court indicated that the appellant's concern for information was premature since "the Statute protects the rights of the child until there is a legal determination". Record 68, page 11 and 12. Those words of the trial court seem very ironic now that the appellant's rights were terminated

by the same court for lack of trying to establish a parental relationship.

Appellant did intend to marry the mother, Record, 51, and he made an offer to provide for the support of the mother and child, Record, 52. There is no evidence in the record relating to the appellant's capacity or ability as a parent. It is the burden of the appellee to show by clear and convincing evidence that appellant was unfit as a parent. Wis. Stat. Section 48.31(1); In the Interest of J.L.W., 102 Wis. 2d 118, 306 N.W.2d 46 (1981); and In the Matter of Termination of Parental Rights to A.M.K., 105 Wis. 2d 91, 312 N.W.2d 840 (Wis. App. 1982). Since the trial court's findings do not direct themselves whatsoever to the issue of fitness, the judgment of termination must be vacated. In the Interest of J.L.W., supra; and In the Matter of Termination of Parental Rights to A.M.K., supra. Since the appellee did not meet her burden of showing parental unfitness of the appellant by clear and convincing evidence and since as a matter of law the trial court should not have found that the appellant had the opportunity and ability to exercise parental responsibility, the judgment of termination should be reversed.

If this court does not reverse the trial court it should remand, for a finding as to the appellant's parental fitness. Regarding options of the court on remand see In the Matter of Termination of Parental Rights to T.R.M., 100 Wis. 2d 681, 688, 291 N.W.2d 660 (1981).

CONCLUSION

This matter should be reversed and the parental rights of the appellant should be reinstated. On remand the case should proceed to

the dispositional stage of the proceedings to determine custody of the child.

If the court does not see fit to reverse the findings of the trial court the case must be remanded for a hearing and finding of parental fitness regarding the appellant.

Respectfully submitted,

DATE: May 14, 1982

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APPENDIX H

WISCONSIN STATUTES
48.415 and 48.91(2)(b)

48.415 GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS. at the fact-finding hearing the court may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

(1) ABANDONMENT. (a) Abandonment may be established by a showing that:

1. The child has been left without provision for its care or support, the petitioner has investigated the circumstances surrounding the matter and for 60 days the petitioner has been unable to find either parent;

2. The child has been placed, or continued in a placement, outside the parent's home by a court order containing the notice required by s. 48.356(2) and the parent has failed to visit or communicate with the child for a period of 6 months or longer; or

3. The child has been left by the parent with a relative or other person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of one year or longer.

(b) Incidental contact between parent and child shall not preclude the court from finding that the parent has failed to visit or communicate with the child under par. (a) 2 or 3. The time periods under par. (a) 2 or 3 shall not include any periods during which the parent has been prohibited by judicial order from visiting or communicating with the child.

(c) A showing under par. (a) that abandonment has occurred may be rebutted by other evidence that the parent has not disassociated himself or herself from the child or relinquished responsibility for the child's care and well-being.

(2) CONTINUING NEED OF PROTECTION OR SERVICES. Continuing need of protection or services may be established by a showing that the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356(2), that the agency responsible for the care of the child and the family has made a diligent effort to provide the services required by the court, and:

(a) The child has been outside the home for a cumulative total period of one year or longer pursuant to such orders and the parent has substantially neglected or wilfully refused to remedy the conditions which resulted in the removal of the child from the home; or

(b) The child has been outside the home for a cumulative total period of 2 years or longer pursuant to such orders, the parent has been unable to remedy the conditions which resulted in the removal of the child from the home and there is a substantial likelihood that the parent will not be able to remedy these conditions in the future.

(3) CONTINUING PARENTAL DISABILITY. Continuing parental disability may be established by a showing that:

(a) The parent is presently, and for a cumulative total period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s. 50.33(1)(a), (b) or (c), licensed treatment facilities as defined in s. 51.01(2) or state treatment facilities as defined in s. 51.01(15) on account of mental illness as defined in s. 51.01(13)(a) or (b) or developmental disability as defined in s. 55.01(2) or (5);

(b) The condition of the parent is likely to continue indefinitely; and

(c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.

(4) CONTINUING DENIAL OF VISITATION RIGHTS. Continuing denial of visitation rights may be established by a showing that:

(a) The parent has been denied visitation rights by court order in an action affecting marriage;

(b) At least 2 years have elapsed since the order denying vistation rights was issued and the court has not subsequently modified its order so as to permit visitation rights; and

(c) The parent would not be entitled to visitation rights if he or she were to seek such rights at the time the petition for temination or parental rights is filed.

(5) REPEATED ABUSE. Repeated abuse may be established by a showing that on more than one occasion the parent has caused death or injury to a minor or minors living in the parent's household resulting in 2 or more separate felony convictions.

(6) FAILURE TO ASSUME PARENTAL RESPONSIBLITY. (a) Failure to assume parental responsibility may be established by a showing that a child has been born out of wedlock, not subsequently legitimated or adopted, that paternity was not adjudicated prior to the filing of the petition for termination of parental rights and:

1. The person or persons who may be the father of the child have been given notice under s. 48.42 but have failed to appear or otherwise submit to the jurisdiction of the court and that such person or persons have never had a substantial parental relationship with the child; or

2. That although paternity to the child has been adjudicated under s. 48.423, the father did not establish a substantial parental relationship with the child prior to the adjudication of paternity although the father had reason to believe that he was the father of the child and had an opportunity to establish a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has ever expressed concern for or interest in the support or well-being of the child or the mother during her pregnancy and whether the person has neglected or refused to provide care or support even though the person had the opportunity and ability to do so.

48.91(2)(b) Except as provided under s. 48.839(3)(b), [termination of a parent's parental rights to a child who is a citizen of a foreign jurisdiction not required] the termination of a parent's parental rights is required as provided in subch. VIII prior to the adoption of the child.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5528

IN THE INTEREST OF BABY GIRL K.,
A PERSON UNDER THE AGE OF 18;

BRYON BUHSE, Appellant,

v.

LISA KRUEGER, Appellee.

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I, Judith Sperling Newton, being first duly sworn, on oath, depose and say that I am the attorney for the appellee in the above-entitled matter; that on the 17th day of January, 1984, I deposited in the U.S. Mail, in Madison, Dane County, Wisconsin, a true and correct copy of the following: Motion to Dismiss or Affirm, Motion for Leave to Proceed In Forma Pauperis, and Affidavits in Support of Motion for Leave to Proceed In Forma Pauperis, secured and enclosed in an envelope, the first class special delivery postage duly paid, said envelope bearing the sender's return address and addressed to the following persons:

Clerk of the United States Supreme Court
1 First Street, N.E., Washington, D.C. 20543

Mr. Gerhardt F. Getzin, Attorney for Appellant
408 - 3rd Street, Suite 307
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Wausau, Wisconsin 54401

Attorney James Kurth, Guardian ad Litem
128 Grand Avenue
P.O. Box 1547
Wausau, Wisconsin 54401

Judith Sperling Newton
Judith Sperling Newton

Duly witnessed and sworn to before me,
a Notary Public, this 17 day of
January, 1984.

Notary Public
State of Wisconsin
County of Dane
My Commission is Permanent.
(expires).

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Office Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-5528

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN THE INTEREST OF BABY GIRL K,
A PERSON UNDER THE AGE OF 18;

BRYON BUHSE, Appellant,

v.

LISA KRUEGER, Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

MOTION TO AFFIRM

JAMES KURTH
Guardian ad Litem for Baby Girl K

128 Grand Avenue
P.O. Box 1547
Wausau, WI 54401

(715)845-2174

MOTION TO AFFIRM

James Kurth, duly appointed Guardian ad Litem for Baby Girl K, respectfully moves this Court for an Order affirming the decision of the Wisconsin Supreme Court which was previously rendered in this matter.

As grounds for and in support of this Motion, it is respectfully shown that a response to the jurisdictional statement has been filed on behalf of the Appellee, Lisa Krueger. Said response is joined in by the Movant on behalf of Baby Girl K.

Respectfully submitted,

JAMES KURTH
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128 Grand Avenue
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(715)845-2174

January 11, 1984